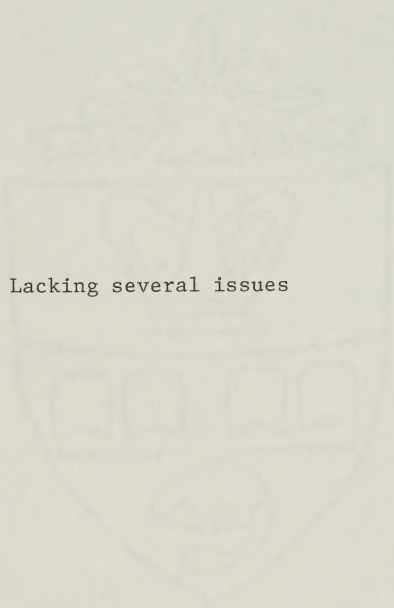




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Summary

CARMEN CASANOVAS, COMPLAIN-
ANT, AND IBERIA, AIRLINES OF
SPAIN, MONTREAL, QUEBEC,
RESPONDENT.

Board File: 745-2762

Decision No.: 700

Résumé de Décision

CARMEN CASANOVAS, PLAIG-
NANTE, ET IBERIA, LIGNES
AERIENNES D'ESPAGNE, MONTREAL
(QUEBEC), INTIME.

Dossier du Conseil: 745-2762

Décision n^o: 700

The complainant filed a complaint
with the Board on November 11,
1987. She alleged that her employer
had dismissed her in violation of
certain provisions of section 184 of
the Canada Labour Code, and
particularly sections 184(3)(a)(i),
184(3)(a)(iii) and (iv), and
184(3)(e)(i) to (iii).

The Board considered and granted
the complaint pursuant to section
184(3)(a)(iii).

The Board unanimously found that
Iberia, Airlines of Spain, had
dismissed the complainant as
punishment for testifying in a
proceeding before the Board.

La plaignante a déposé une plainte
auprès du Conseil le 11 novembre
1987. Elle y allègue que son
employeur l'a congédiée en
contravention des dispositions de
l'article 184 du Code, plus
particulièrement des sous-alinéas
suivants: 184(3)a(i), 184(3)a(iii)
et (iv), 184(3)e(i) à (iii).

Le Conseil a analysé et accueilli la
plainte en vertu du sous-alinéa
184(3)a(iii).

Le Conseil a unanimement conclu
que c'est pour la punir d'un
témoignage fait lors d'une audience
du Conseil que la société Iberia a
congédié la plaignante.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

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No de tél.: (819) 956-4802
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Reasons for decision

Carmen Casanovas,

complainant,

and

Iberia Airlines of Spain,
Montréal, Quebec,

respondent.

Board File: 745-2762

The Board was composed of Mr. Marc Lapointe, Q.C.,
Chairman, and Mr. Jacques Alary and Ms. Ginette Gosselin,
Members.

Appearances:

Mr. Richard Cleary, for the complainant; and

Mr. Louis Lemire, for the respondent.

These reasons for decision were written by Ms. Ginette
Gosselin, Member.

I

This decision deals with a complaint filed on November 11,
1987 by Mrs. Carmen Casanovas against her employer, Iberia
Airlines of Spain, Montréal (the employer or Iberia). The
complaint, filed pursuant to sections 184(3)(a)(i), (iii),
(iv) and 184(3)(e)(i), (ii) and (iii) of the Code, alleges
that the complainant was dismissed for reasons prohibited
by these sections.

Mrs. Casanovas, who was dismissed on November 10, 1987,
began working for Iberia in March 1987 as an administration
officer. She is a member of Local 4027 of the Canadian
Union of Public Employees (Airline Division), which was
certified on September 16, 1987. No collective agreement
was in force at all relevant times in this case.

The employer denies dismissing the complainant for the reasons alleged in the complaint. It claims that Mrs. Casanovas was dismissed for having committed a flagrant breach of confidentiality against Iberia.

A hearing took place in Montréal on April 6 and May 27, 1988.

II

The facts of this case can be summarized as follows.

On November 3, 1987, Mrs. Casanovas testified before the Board at a hearing into a complaint of unfair labour practice pursuant to section 184 of the Code by a fellow worker, Mr. Dos Reis, against Iberia (Iberia Airlines of Spain (1988), as yet unreported CLRB decision no. 688). Her testimony followed that of Mr. A.F. Montano, administrator, who testified for Iberia. Mrs. Casanovas then testified that she had seen a letter to Iberia/Madrid that described the recent unionization of a group of Iberia/Montréal employees. According to Mrs. Casanovas, this letter implied that the employer had been informed that an anti-union petition had been circulated among certain employees affected by the application for certification and that the employer had written evidence to that effect. This letter from Iberia/Montréal was written by Mr. A.F. Montano and signed by Mr. Navarrete, Iberia's general manager for Canada.

The Board then questioned Mrs. Casanovas about this letter and how she had obtained it. She testified, albeit reluctantly, that she learned of the letter's contents while transcribing the text from the ribbon of her typewriter, the letter having been typed on her machine by another

employee. She filed with the Board the text of the letter she had transcribed from the ribbon. This letter was marked "Confidential."

When asked during her testimony in the instant case to explain her behaviour, Mrs. Casanovas related an incident that occurred during another Board hearing at the beginning of September 1987 into an initial complaint she had filed against her employer in February 1987. On September 3, then, Mr. Montano, while testifying for Iberia, filed a letter that he claimed to have sent the complainant in reply to her letter of the previous day. Mrs. Casanovas categorically denied ever receiving Mr. Montano's reply; it was never communicated to her.

Mrs. Casanovas began at that point to suspect and fear that some of the employer's representatives were "preparing evidence" for the cases to be heard by the Board. She monitored what went on in the office. This explained why, on Friday, October 30, when she reached the end of the ribbon in her typewriter, she did not discard it in the wastebasket near her desk, as she normally did and as was company practice, but decided to keep it in order to see whether there was any such "prepared evidence" on it.

She took the ribbon home and during the weekend transcribed by hand, into a school notebook, the letter that Mr. Navarrete had written to Iberia/Madrid on October 19, 1987. This letter had been typed by Mrs. Valesco, a supervisor in the administration office. The testimony heard revealed that employees quite often use, at their convenience, a co-worker's typewriter.

On Monday, November 2, 1987, she gave the notebook containing the transcript of the letter to Mrs. Verreault, an

Iberia employee and president of the CUPE Local, but did not have time to discuss it with her. They did not finally discuss the letter until the morning of the hearing on November 3, 1987. Later that day, during an adjournment, there was another discussion of the letter. In addition to Mrs. Verreault and Casanovas, Mrs. Gundel and Mr. Dos Reis, Iberia employees and complainants in the proceeding then before the Board, Mr. Leclerc, a CUPE representative, and Mr. Cleary, counsel for the complainants, also took part in the discussion. This discussion concerned the appropriateness of calling Mrs. Casanovas to testify about the letter she had transcribed. She finally decided to testify, despite her fear of reprisals by her employer.

As we noted earlier, Mrs. Casanovas' testimony on November 3 followed that of Mr. Montano, a witness for the employer. The documents filed in the instant case, specifically the record of the hearing on November 3 (Exhibit 12, at pages 2 and 3) and the Board's decision in this case (Exhibit 17, at page 5 of the decision and at pages 5 and 6 of the dissenting opinion), and the testimony of Mr. Dos Reis, a complainant at the November 3 hearing, which testimony we have no reason to doubt, reveal that Mr. Montano was reluctant to answer Mr. Cleary's questions concerning the existence of this written evidence.

Following Mrs. Casanovas' testimony, Mr. Montano agreed to file an official copy of this letter, and a copy was in fact entered in the record. We are quoting here the passage from the letter that is said to show that the employer had in its possession a document describing the opposition of certain employees to joining a union:

"... Total persons included 27, some of them without wanting (according to written constancy (stout-heartedness) but that were included because their duties were the ones described in the positions included in the Union."

When re-examined on November 3 concerning this same letter, Mr. Montano explained that the words "written evidence" did not necessarily mean that he had seen a document. He had heard about it and had assumed that what he heard was true. When questioned on this same subject at another session of the same hearing, Mr. Navarrete stated that he had learned from Mr. Montano that such a petition was circulating, that he had not seen it, and that instead of using the words "written evidence," he could just as easily have used the words "according to what someone told us."

When questioned further during the hearing about the meaning of the words "written evidence," Mr. Navarrete gave this explanation:

"These persons, the ones who didn't want to join a union, repeatedly said they didn't want, in the administration office - they wrote a document - I don't know if, I don't believe that management kept this document - we wanted to stay out of this matter - but when I make a report to Madrid, I must be specific."

(translation)

He added that he did not have this written evidence and that he did not need to send this document to Madrid.

On November 4, 1987, the day after Mrs. Casanovas testified before the Board, an Iberia management employee asked her to acquaint another employee, who had been working in the department for a few months, with her duties so that this employee could replace her when she was on vacation, on leave of absence, etc. Mrs. Casanovas had never before received such a request.

The same day, Mr. Navarrete issued the following memorandum (Exhibit 9) to all Iberia employees:

"November 4, 1987

From: General Manager for Canada

To: All personnel

We consider it necessary to remind staff, as everyone is aware, of the trust that our Company has placed in us.

The use that we must make of equipment and services must at all times be in keeping with Iberia's needs.

The product we produce is solely for the use of Iberia and only in cases where this product is intended for our customers can it be released outside the company, by order of Management.

The confidentiality that must be observed in the use of Company documents, where necessary, is clear, as indicated in our Regulations establishing standards and Code of Ethics subsequently appended to these Regulations.

The use, by unauthorized persons, of material that falls into this category, for a purpose and intent other than that for which it was initially intended, is considered a very serious offence and hence subject to punishment that is in keeping with the seriousness of the act.

Iberia, which obeys the laws of all countries in which it operates, will avail itself of these same laws to protect itself from the indiscreet or fraudulent use of its property.

Sincerely,

L. Navarrete
General Manager for Canada"

(translation)

On November 10, around 4:30 p.m., Mrs. Casanovas was informed by Mr. Navarrete, in the presence of Mr. Montano, that she was being dismissed immediately because, she was told, she had removed confidential documents from the office. There was no further discussion. Mrs. Casanovas did not argue; she left. She tried unsuccessfully to contact Mrs. Verreault and then notified Mr. Leclerc of CUPE by telephone of her dismissal. Mr. Leclerc had a telephone conversation with Mr. Navarrete the following day, but failed to persuade him to rescind his decision to dismiss Mrs. Casanovas.

Approximately one week later, at Mrs. Casanovas' request, Mr. Montano gave her her severance pay and separation certificate for purposes of unemployment insurance.

At the hearing, Mr. Navarrete confirmed that it was his decision, made after consulting his lawyers, to dismiss the complainant. He added that he considered that Mrs. Casanovas had committed a very serious offence by removing the ribbon from the office, transcribing part of it and revealing its contents to persons outside the company. Mr. Navarrete also explained that he relied on articles 71 and 78 of the Internal Management Regulations, Canada Delegation (Exhibit 8A), that Iberia applies in its relations with its employees. These articles read as follows:

"Article 71. - EMPLOYEES' DUTIES

All employees must give proof of discipline, professional conscience, good behaviour and discretion.

Furthermore, employees must particularly be attentive and polite in their work with clients and abstain from expressing unfavourable opinions or interventions against the Company's interests or its executives, or personnel in general.

They must respect and develop standards of security, legality, regularity, high quality, and economy which characterize the Company's activity.

Employees will not be able to have any activity which is incompatible with the Company's interests and they will also abstain from receiving tips or gratuities from third parties as a consequence of their functions.

...

Article 78. - DISMISSAL OR EXCLUSION

In cases of serious offenses, recognized as such, the Company may dismiss immediately the employees guilty of such faults, even without advance notice nor indemnization.

If during the period of advance notice the employee gives a cause for his immediate dismissal, he will only be paid for the time he has actually worked during the notice period."

Mr. Navarrete could not confirm that Mrs. Casanovas had received a copy of this document.

Finally, he denied any knowledge of Mrs. Casanovas' union activities and stated that his decision to dismiss her was based solely on the facts of the case and articles 71 and 78 of Iberia's regulations.

In concluding this lengthy presentation of facts, the Board wishes to add that the evidence established that documents in use at Iberia/Montréal are frequently classified confidential, that each department has its own such documents, and that Mrs. Casanovas was often required to type them. It is the Board's understanding, from the testimony given by the employees, that the designation "confidential" may apply equally to either urgent or important documents. Finally, apart from a disciplinary notice the complainant received in February 1987, which was removed from her file after the Board upheld the complaint she made against this notice, Mrs. Casanovas had an unblemished record, and no evidence was presented of any other alleged misconduct on her part. The Board was also told that the two dismissals by Iberia in recent years were both the result of fraud.

Apart from the question of whether the employer had in its possession written evidence that some employees were opposed to the union, the facts are not contested.

With regard to this famous "written evidence" about which so much has been said in these reasons and which led Mrs. Casanovas to testify before the Board, the Board is of the opinion that the employer had this written evidence in its possession at least for a certain period of time. Mr. Navarrete's testimony before the Board and especially, of course, the letter which Mrs. Casanovas copied and in

which Mr. Navarrete refers to written evidence lead us to this conclusion. We cannot believe that Mr. Navarrete fills the reports he sends to the parent company in Madrid with random comments. Moreover, he himself admitted as much to us: "When I make a report to Madrid, I must be specific."

It was only as the result of what we would characterize as the evasive testimony given by Mr. Montano on November 3 that Mrs. Casanovas decided to reveal her action to the Board, thereby bringing it to the employer's attention. The employer had no knowledge of it and there is nothing to indicate that Mrs. Casanovas made any other use of the letter she had copied.

III

The complaint alleges a violation of the following provisions of the Code:

"184.(3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part,

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

- (i) testifying or otherwise participating in a proceeding under this Part,
- (ii) making a disclosure that he may be required to make in a proceeding under this Part, or
- (iii) making an application or filing a complaint under this Part;..."

In all these cases, the Code creates a presumption in the complainant's favour and, under the terms of section 188, places the burden of proof on the party that denies having contravened section 188(3):

"188.(3) Where a complaint is made in writing pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 184(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

The scope of this provision has been examined in a number of Board decisions, including Rapide Transport Inc. (1986), 64 di 135 (CLRB no. 561). We then refer the parties to this decision.

Since counsel for the complainant argued principally that Mrs. Casanovas was dismissed for having testified before the Board, we will begin by examining the complaint under section 184(3)(a)(iii). We will examine the other provisions only if the complaint were to be dismissed under this provision.

Examination of the Complaint under Section 184(3)(a)(iii)

Reported case law contains few cases involving a violation of this provision of the Canada Labour Code or of similar provisions of provincial labour codes. In the chapter entitled "Protection of Access to the Board: Sections 184(3)(a)(iii) to (v), 184(3)(e)(i) to (iii), and 185(i)

to (iii)," Canada Labour Relations Board Policies and Procedures (Toronto: Butterworths, 1986), at pages 359 ff., the authors, Mr. Claude Foisy et al., underline in the analysis of Board precedent the objectives of section 184(3)(a)(iii), which they consider together with the other above-mentioned sections:

"... These provisions of the Code have at least a two-fold purpose. First, they are intended to ensure that rights under the Code are real and not merely illusory and capable of being frustrated by acts designed to discourage their exercise. ...

The second purpose of these provisions is closely related to the first. This purpose is to encourage and hopefully to ensure honest and candid testimony and disclosure to the Board in its administration of Part V. ...

As with other anti-discrimination provisions of the Code, motive is a constituent element of an infraction of s. 184(3)(a)(iii) to (v) and (e). The prohibited motive is a desire to punish an individual for participating in proceedings under the Code. A common characteristic of these sections and of s. 184(3)(a)(i) is that the Board must be satisfied that the activities described therein were not part of the reason for any disciplinary or other prejudicial action by the employer. Thus, the prohibited consideration in these sections need not be the sole one. ..."

(pages 359-360)

In this case, then, it is not anti-union animus that is prohibited, but rather the desire to punish an employee who has testified or otherwise participated in a proceeding under the Code, or who may do so. The distinction may appear subtle because, of course, this desire may stem from anti-union animus, but anti-union animus need not be established. Participation in proceedings under the Code that ultimately ensure compliance with its provisions must be vigorously protected. In order to establish a violation, the Board need look no further than the prohibited motive specifically enunciated in this provision.

The Board made the same finding in Rogers Cable T.V. (British Columbia) Ltd. (1987), 69 di 17; and 16 CLRBR (NS) 71 (CLRB no. 616), in which it examined the scope of section 184(3)(a)(vi):

"... In section 184(3)(a)(vi) complaints, the absence of such anti-union animus need not be fatal to a complaint if it was found that an employer transferred, demoted, laid off or disciplined employees, or treated them in any other way that is prohibited by the section, simply to punish them for withdrawing their services or for carrying picket signs. The mere act of taking retribution against the employee for participating in a lawful strike is sufficient to constitute a violation of section 184(3)(a)(vi) without the need for the union to prove that the employer was singling out union leaders to discourage employees from exercising their rights or that there is an underlying scheme to get rid of a union."

(pages 33; and 88; emphasis added)

We therefore have to decide in the instant case whether Iberia's decision to dismiss Mrs. Casanovas was motivated in whole or in part by the desire to punish her for participating in a proceeding under the Code.

The employer in this case denies dismissing the complainant for one of the reasons alleged; it dismissed her, it claims, for a breach of confidentiality. Moreover, argues counsel for the employer, Mrs. Casanovas' testimony was not the cause of her dismissal, but merely the opportunity for the employer to learn of the complainant's misconduct, namely, the breach of confidentiality.

This is a persuasive argument. However, it must be remembered that the offence alleged against Mrs. Casanovas occurred while she was participating in a proceeding under the Code and that this offence came to light only during the course of the hearing before the Board, in the circumstances described earlier.

In short, the employer's argument, no matter how it is phrased, is that it had a valid reason for dismissing the complainant, without a prohibited ulterior motive.

The facts, however, do not support this argument. The employer bases its allegation that the complainant committed a breach of confidentiality on a text that says virtually nothing about confidentiality (article 71 of Iberia's internal regulations quoted earlier). We find it very significant that, the day following Mrs. Casanovas' testimony, the employer saw fit to make clear, in its memorandum to all employees, that such a breach of conduct was considered a very serious offence and hence subject to punishment in keeping with the seriousness of the act.

We also find it significant, in the circumstances of the instant case, that the employer felt obliged to consult its lawyers before acting. Although the decision must have been taken, since Mrs. Casanovas was asked the day following her testimony to begin training an employee who could eventually replace her, the employer took the time to consult its lawyers. Angered by the complainant's revelations in her testimony before the Board, the employer nevertheless strongly suspected that the law limited its power to dismiss in the circumstances.

The facts also reveal that a so-called "breach of confidentiality" entails far less than its pretentious name implies. The Board's role in this case is not to substitute its judgment for that of the employer, but rather to analyze the relationship of the penalty imposed on the complainant to the offence alleged against her, with a view to identifying the motive for the action.

The Board had the following to say on this subject in a recent decision that dealt with a complaint pursuant to section 184(3)(a)(i):

"Thus, in order for the Board to dismiss the complaint, the employer must establish, through a preponderance of evidence, that its conduct was devoid of any anti-union animus. To satisfy the Board, the evidence adduced must be convincing and above all credible.

The Board does not as much have to deal with the fairness, sufficiency or even reasonableness of an administrative decision (see, however, Oshawa Flying Club (1981), 42 di 306; and [1981] 2 Can LRBR 95 (CLRB no. 293); and Canada Labour Relations Board Policies and Procedures, supra, page 247). However, the more uncharacteristic an action is of an average employer's behaviour, the less likely it is that the employer's evidence will be convincing."

(Cablevision du Nord de Québec Inc. (1988), as yet unreported CLRB decision no. 681, page 5)

The Board believes in this regard that, unless an employer is totally naive or ignorant of present-day realities, it must clearly expect employees who take part in an adversarial proceeding like the one in question here to defend themselves and to tell what they know at this proceeding. An employer must take all this into account when disciplining an employee in such circumstances, just as it would consider all the details of a case before disciplining an employee for an alleged offence committed in another context.

Of what does the complainant stand accused? Of having in her possession an object from her work place that was of no further use to her employer, of examining the contents of this object and, in the course of a proceeding before the Board, of revealing its contents to three fellow workers, a union representative present at the hearing, her counsel and finally the Board.

In the instant case, the Board could, as Lamer J. did in a recent judgment of the Supreme Court of Canada (Wayne John Stewart v. Her Majesty The Queen, [1988] 1 S.C.R. 963; and (1988), 85 N.R. 171), examine the notion of confidentiality and, depending on our finding, decide, for example, that the document was not confidential. Therefore, the only remaining ground for dismissal would merely be the complainant's participation in a proceeding under the Code. The complaint would thus automatically be upheld.

Because we are dealing with a labour relations issue, we will not follow the lead of Lamer J., but will instead pursue our analysis of the relationship of the alleged offence to the penalty imposed. We believe, in the light of the circumstances related to us (i.e. the recent certification, the complaints under section 184(3) of the Code now before the Board, the atmosphere of mistrust in the work place, etc.) that Iberia overreacted, especially when one considers that it was through its own negligence that Mrs. Casanovas learned of the existence of the famous letter to Madrid. The Board cannot help but conclude, when it compares the reason for this dismissal with the reason for earlier dismissals by this employer, that these two reasons are not equally valid and that the punishment should reflect this fact. That is not the case. It should also be noted here that the complainant had an unblemished disciplinary record.

IV

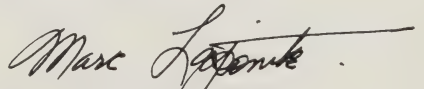
In the light of all the above-mentioned facts, the Board finds in the instant case that the employer, clearly shocked that Mrs. Casanovas' revelations could call into question the credibility of one of its principal representatives, decided to punish her. It blew out of proportion

an indiscretion committed by the complainant, characterizing it as a serious breach of confidentiality that warranted dismissal, thereby hoping to conceal its real motive. It is this type of practice that section 184(3) of the Code prohibits.

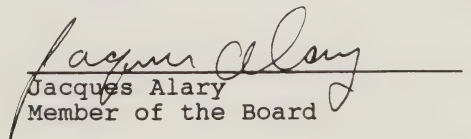
For all these reasons, the Board unanimously grants the complaint. Accordingly, Iberia Airlines of Spain is hereby ordered to:

- reinstate Mrs. Casanovas immediately in the position she occupied prior to her dismissal;
- pay to her compensation equivalent to the remuneration she would have received between November 11, 1987 and the date of her reinstatement had she not been dismissed; and
- remove from the complainant's disciplinary record any reference to this measure.

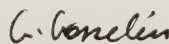
The Board designates Mrs. Debra Robinson of its Montréal regional office to assist the parties in implementing this decision and reserves jurisdiction in this case in the event that they are unable to reach an agreement.



Marc Lapointe, Q.C.
Chairman



Jacques Alary
Member of the Board



Ginette Gosselin
Member of the Board

ISSUED at Ottawa, this 30th day of June 1988.

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Summary

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 625, APPLICANT, AND
TRANSPORT TRANSBO INC.,
EMPLOYER.

Board File: 555-2765

Decision No.: 704

This case deals with an application
for certification under section 124
of the Canada Labour Code con-
cerning employee drivers and
dependent contractors.

The Board questions the relevance
of including in the same unit the
employee drivers and the dependent
contractors knowing that even if the
two groups carry out the same
functions, they do not necessarily
share the same community of
interest.

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Résumé de Décision

SYNDICAT INTERNATIONAL DES
TRAVAILLEURS UNIS DE L'ALI-
MENTATION ET DU COMMERCE,
LOCAL 625, SYNDICAT
REQUÉRANT, ET TRANSPORT
TRANSBO INC., EMPLOYEUR.

Dossier du Conseil: 555-2765

Décision n^o: 704

Il s'agit d'une requête en accrédi-
tation présentée en vertu de l'article
124 du Code canadien du travail
visant des employés chauffeurs et
des chauffeurs entrepreneurs
dépendants.

Dans cette décision, le Conseil
s'interroge sur la pertinence d'in-
clure, dans la même unité, les
employés chauffeurs et les
chauffeurs entrepreneurs dépendants,
sachant que même si les deux
groupes exercent le même métier,
ils n'ont pas nécessairement la même
communauté d'intérêts.



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Reasons for decision

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United Food and Commercial
Workers International Union,
Local 625,

applicant,

and

Transport Transbo Inc.,

employer.

Board File: 555-2765

The Board was composed of Mr. Marc Lapointe, Q.C.,
Chairman, and Ms. Ginette Gosselin and Mr. J. Jacques
Alary, Members.

Appearances:

Mr. Robert Dury, for the applicant; and

Mr. Jacques Audette, for the employer.

These reasons for decision were written by Mr. J. Jacques
Alary, Member.

I

This case deals with an application for certification
made pursuant to section 124 of the Canada Labour Code
(Part V - Industrial Relations) concerning the United Food
and Commercial Workers International Union, Local 625,
applicant, and Transport Transbo Inc., Saint-Simon-de-
Bagot, Quebec, employer.

This application was filed with the Board on March 2, 1988.

The employer, Transport Transbo Inc., is a general carrier
of a variety of goods, specializing more particularly in
transporting live animals and carcasses or cuts of meat.
Moreover, it transports goods by contract for different

companies. Transport Transbo Inc. holds various licenses that allow it to operate in certain Canadian provinces and certain American states and, in this regard, the employer did not contest the Board's jurisdiction. Moreover, the exhibits on file establish that Transport Transbo Inc. comes under federal jurisdiction.

For its part, the applicant union filed certain documents in order to establish its status. After examining these documents, the Board is satisfied that the union meets the requirements set down in section 107 of the Code:

"'trade union' means any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees."

Finally, in considering the unit proposed in the application, the Board noted that it comprises employees and dependent contractors.

II

In Lapointe et Fils Limitée (1988), 66 di 229 (CLRB no. 694), the Board specifically excluded dependent contractor drivers from the proposed appropriate bargaining unit, even though none were at issue.

The Board was indicating, via that decision, that it questions the appropriateness of including employee drivers and dependent contractor drivers in the same unit, knowing that even if the two groups perform the same work, they do not necessarily share the same community of interest.

The Board would like at this point to examine briefly the difference between the two groups.

Dependent contractor drivers are persons who invest in the purchase of a vehicle sums that may exceed \$100,000 in order to transport, on behalf of a road carrier, goods from a point of origin to a destination. To this end, they assume not only capital costs and interest thereon, but also all expenses associated with the operation of the vehicle: insurance, fuel, tires, maintenance and repairs.

Normally, these dependent contractor drivers own a tractor with which they haul trailers belonging to the principal carrier. Sometimes the contractor also owns the trailer. Some dependent contractors own only a truck equipped with a box, commonly called a delivery truck. Other own pickup trucks, automobiles or bicycles.

These contractors are remunerated on the basis of productivity: they are paid by kilometre, weight, parcel, envelope or on some other basis.

Since the announcement of deregulation, there has been a significant increase in the number of these dependent contractor drivers in the trucking industry.

They are often attached to a single company for whom they must work exclusively and they are required to display the principal carrier's name on their vehicles.

In some provinces, their vehicles must be licensed in the name of the principal carrier who is obliged to pay the various taxes imposed.

The transportation of goods between provinces and countries is the responsibility of the principal carrier and, in these cases, dependent contractor drivers operate under the licenses held by the principal carrier.

For his part, the employee driver is hired by the company. He performs the same type of work, but using company vehicles. His role is limited to performing the work and he provides only his skill, experience and dedication. He is remunerated by the hour, the kilometre, or on some other basis. His compensation includes only pay and benefits.

While the two groups have common interests, their interests are thus very different in some respects.

The dependent contractor driver normally has a heavy financial responsibility and must ensure that his creditors are paid on time if he wishes to remain in business.

The employee driver has the responsibilities of a worker who provides his services and does not have to fear, barring unforeseen circumstances, losing the means with which he performs his work.

III

It is not a new Board practice to certify unions to represent bargaining units composed solely of employee drivers, solely of dependent contractor drivers, or comprising both groups. However, having examined the collective agreements in certain cases and noted that the two groups do not always enjoy the same benefits acquired through the right of association that is guaranteed by the

Canada Labour Code, the Board questions the appropriateness of always including dependent contractor drivers in or excluding them from a unit of employees of a company.

In some businesses where the certification covers both groups, it would appear that dependent contractor drivers are dominated by the other group since they are in a minority in the unit.

In other cases, they are required to pay union dues (which is equivalent to an employment right) even though they apparently have no right to representation by the union, negotiate their terms and conditions of employment individually, and do not even have recourse to the mechanisms provided by the Code for resolving disputes or differences.

In the light of these observations, the Board is increasingly questioning the appropriateness of including these contractors in or excluding them from a proposed unit.

The Board wishes to ensure that, if it includes them in the unit, they will receive the same quality of representation from the bargaining agent as do the other employees in the unit. It would not want to see the request to include them used merely as a means of avoiding the transfer of work from employee drivers to dependent contractors or of recovering dues lost as the result of the replacement of an employee with a dependent contractor.

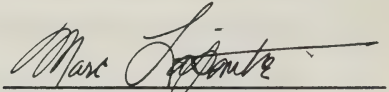
IV

The Board, after studying the present case, is satisfied that the applicant has the necessary majority support

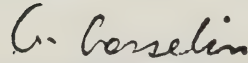
among the employee drivers and dependent contractor drivers to include them in the same unit. Moreover, having concluded that the dependent contractors are employees within the meaning of the Canada Labour Code, the Board grants the application.

Accordingly, it certifies the applicant to represent:

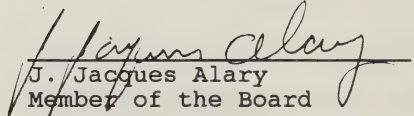
"all employees of Transport Transbo Inc., St-Simon-de-Bagot, Quebec, excluding office employees, dispatchers, foremen and those above."



Marc Lapointe, Q.C.
Chairman



Ginette Gosselin
Member of the Board



J. Jacques Alary
Member of the Board

DATED at Ottawa, this 27th day of July 1988.

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Summary

Résumé de Décision

CANADIAN OVERSEAS TELECOM-
UNICATIONS UNION (COTU), APPLICANT,
AND TELEGLOBE CANADA ,
EMPLOYER, AND COMMUNICATIONS
WORKERS OF CANADA LOCAL 1653
AND TELECOMMUNICATIONS,
TECHNICAL AND PROFESSIONAL
EMPLOYEES OF TELEGLOBE CANADA,
INTERVENERS.

LE SYNDICAT CANADIEN DES
TELECOMMUNICATIONS TRANSMARINES
(LE SCTT), REQUERANT, ET
TELEGLOBE CANADA, EMPLOYEUR,
ET LE SYNDICAT DES TRAVAILLEURS
EN COMMUNICATION DU CANADA,
SECTION LOCALE 1653 ET L'ASSO-
CIATION DES EMPLOYES TECHNIQUES
ET PROFESSIONNELS EN TELECOMMU-
UNICATIONS DE TELEGLOBE CANADA,
INTERVENANTS.

Board Files: 530-682
555-1707

Dossiers du Conseil: 530-682
555-1707

TELECOMMUNICATIONS, TECHNICAL
AND PROFESSIONAL EMPLOYEES
OF TELEGLOBE CANADA, APPLICANT,
AND TELEGLOBE CANADA, EMPLOYER,
AND THE CANADIAN OVERSEAS
TELECOMMUNICATIONS UNION
(COTU) AND COMMUNICATIONS
WORKERS OF CANADA LOCAL 1653,
INTERVENERS.

L'ASSOCIATION DES EMPLOYES
TECHNIQUES ET PROFESSIONNELS
EN TELECOMMUNICATIONS DE
TELEGLOBE CANADA, REQUERANTE, ET
TELEGLOBE CANADA, EMPLOYEUR, ET
LE SYNDICAT CANADIEN DES
TELECOMMUNICATIONS TRANSMARINES
ET LE SYNDICAT DES TRAVAILLEURS
EN COMMUNICATION DU CANADA,
SECTION LOCALE 1653, INTERVENANTS.

Board Files: 555-1705
555-1843

Dossiers du Conseil: 555-1705
555-1843

COMMUNICATIONS WORKERS OF CANADA
LOCAL 1653, APPLICANT AND
TELEGLOBE CANADA, EMPLOYER,
AND THE CANADIAN OVERSEAS
TELECOMMUNICATIONS UNION (COTU),
AND TELECOMMUNICATIONS, TECHNICAL
AND PROFESSIONAL EMPLOYEES OF
TELEGLOBE CANADA, INTERVENERS.

LE SYNDICAT DES TRAVAILLEURS EN
COMMUNICATION DU CANADA,
SECTION LOCALE 1653 (LE STCC),
REQUERANT, ET TELEGLOBE CANADA,
EMPLOYEUR, ET LE SYNDICAT
CANADIEN DES TELECOMMUNICATIONS
TRANSMARINES ET L'ASSOCIATION DES
EMPLOYES TECHNIQUES ET PRO-
FESSIONNELS EN TELECOMMUNICATIONS
DE TELEGLOBE CANADA, INTERVENANTS.

Board File: 555-1713
Decision No.: 720

Dossier du Conseil: 555-1713
No de Décision: 720



In this case, five complex applications were involved, one of which was a revision of an existing bargaining certificate and the other four were applications for certification. An important number of "professionals" were involved in these applications. This led the Board for the first time to study in depth Section 27 of the Code which deals with professionals as well as the definition of the term "professional" in Section 3 of the Code.

Il s'agissait de cinq requêtes complexes, dont une en revision d'un certificat d'accréditation existant et quatre requêtes en accréditation. Un groupe important de "professionnels" était impliqué dans ces requêtes. Ceci amène le Conseil à faire pour la première fois une étude exhaustive de l'article 27 du Code qui traite des professionnels et de la définition du terme "professionnel" contenue dans l'article 3 du Code.

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| Relations du |
| Travail |

Canadian Overseas
Telecommunications Union
(COTU),

applicant,

and

Teleglobe Canada,

employer.

Board File: 530-682

Telecommunications, Technical
and Professional Employees of
Teleglobe Canada,

applicant,

and

Teleglobe Canada,

employer,

and

Canadian Overseas
Telecommunications Union and
Communications Workers of
Canada, Local 1653,

interveners.

Board File: 555-1705

Canadian Overseas
Telecommunications Union
(COTU),

applicant,

and

Teleglobe Canada,

employer,

and

Communications Workers of
Canada, Local 1653, and
Telecommunications, Technical
and Professional Employees of
Teleglobe Canada,

interveners.

Board File: 555-1707

Communications Workers of
Canada, Local 1653 (CWC),

applicant,

and

Teleglobe Canada,

employer,

and

Canadian Overseas
Telecommunications Union and
Telecommunications, Technical
and Professional Employees of
Teleglobe Canada,

interveners.

Board File: 555-1713

Telecommunications, Technical
and Professional Employees of
Teleglobe Canada,

applicant,

and

Teleglobe Canada,

employer,

and

Canadian Overseas
Telecommunications Union and
Communications Workers of
Canada, Local 1653,

interveners.

Board File: 555-1843

The Board was composed of Mr. Marc Lapointe, Q.C., Chairman,
and Messrs. Lorne E. Shaffer and Victor E. Gannon, Members.

Appearances:

Mr. Pierre Grenier, for the Canadian Overseas
Telecommunications Union;

Mr. Claude Melançon, for the Communications Workers of
Canada, Local 1653;

Mr. Laurent Taschereau, for the Telecommunications,
Technical and Professional Employees of Teleglobe Canada;
and
Messrs. Robert Skelly and Dennis P. Griffin, for Teleglobe
Canada.

These reasons for decision were written by Mr. Marc
Lapointe, Q.C., Chairman.

I

These cases are another indication of the difficulties over
the years pertaining to the determination of the collective
bargaining structures in this enterprise, which employs
quite a number of professionals or quasi-professionals.

On July 17, 1979, the Board issued the last in a series of
orders that either created, clarified or amended the
bargaining units encompassing various groups of employees
in this enterprise. That decision was Teleglobe Canada
(1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025
(partial report) (CLRB no. 198).

In that decision, the Board amended the bargaining certifi-
cate of the Canadian Overseas Telecommunications Union
(hereinafter COTU) to read as follows:

*"all employees of Teleglobe Canada, in Canada,
assigned to the conception, planning, setting up,
operation, and technical maintenance and repair
of equipment with the exception of professional
employees as defined by the Code, persons who
perform management functions and employees covered
by other Certification Orders issued by the Canada
Labour Relations Board, but including all
employees of the employer in Canada assigned to
building maintenance functions."*

(emphasis added)

Another union, the Communications Workers of Canada, Local 1653 (hereinafter CWC), held another bargaining certificate which read as follows in April 1978:

"all office and clerical employees, excluding..."

followed by a long list of classifications or positions excluded from the scope of this certificate. Further amendments were made on October 24, 1978 and February 27, 1981 (to change the name of that union).

Furthermore, as at May 25, 1976, the Board had issued a bargaining certificate for (see file no. 555-486):

"all employees of Teleglobe Canada employed in Canada as technical supervisors."

In other words, there were three bargaining units certified by the Board at Teleglobe when the first of the applications under consideration was filed (file no. 530-682).

That first application, an application for review, was filed on March 30, 1981 by the Canadian Overseas Telecommunications Union.

It read as follows:

"We represent the Canadian Overseas Telecommunications Union, which filed an application for review pursuant to section 119 of the Canada Labour Code on June 22, 1976. Following this application, the Board issued a decision on July 17, 1979, amending the description of the bargaining unit for which the applicant union was certified.

In October 1980, the Federal Court of Appeal dismissed the employer's application contesting the Board's decision pursuant to section 28 of the Federal Court Act. The parties then engaged in discussions with a view to reaching an agreement on the more specific content of the bargaining unit determined by the Board. These discussions continued until March 6, 1981; at a meeting held on that date, the employer stated its final

position regarding its interpretation of the bargaining unit for which the applicant union was certified. The union we represent feels that the interpretation adopted by the employer is completely restricting and in no way reflects the intended scope of the bargaining certificate issued by the Board in its decision.

... we ask the Board, as it suggested we do in its decision of July 17, 1979, to reconsider this matter in order to clarify and/or even amend if necessary, as it deems appropriate, the bargaining unit the applicant union represents."

(translation; emphasis added)

The Telegraph Canada decision, supra, therefore had not, according to this union, rectified the problems that the Board had sought to redress.

It is true that in that decision the Board had written:

"The bargaining unit description, as amended by the Board, reflects the Board's understanding of the situation as of the time of the completion of the parties' submissions, both written and verbal, to the Board. As indicated in these Reasons, the company has been involved in a continuing process of growth and reorganization.

The amended bargaining certificate seeks to take into account this ongoing process. The Board is very much aware, as we have explained above, of the continuing effect of a bargaining certificate and the structure of labour relations thus sanctioned between the parties. Should the parties, because of the time elapsed since the application or because of subsequent changes within the enterprise, have difficulty with the terms of the new bargaining certificate they would, as we have made clear, be welcome before the Board should they wish to have the Board's Order clarified or, if necessary, modified."

(pages 342; and 147)

In that decision, the Board had provided a lengthy explanation of the evolution of this enterprise. But, in order to give an idea of the extent to which the bargaining certificates covering the employees represented by COTU had evolved between 1952 and July 17, 1979, when the above-cited amendment was ordered by the Board, the certificate issued

on August 8, 1952 read, as reported in Teleglobe Canada,
supra:

"On August 8, 1952 the Overseas Communications Union, Local 272 (C.L.C.) was granted an amended bargaining certificate which read as follows:

'NOW, THEREFORE, it is hereby ordered by the Canada Labour Relations Board that the Overseas Communications Union, Local No. 272, C.L.C., be and it is hereby certified to be the bargaining agent for a unit of employees of the Canadian Overseas Telecommunication Corporation, comprising operating and engineering employees classified as cable and radiotelegraph operators, engineers, technicians, artisans, other than those in supervisory positions, stationary engineer Bamfield, telephone operators, local delivery clerks, and excluding city traffic chief.'"

(pages 272; and 87-88; emphasis added)

Furthermore, in 1952, the certification covered 154 employees and the employer had a total staff of 245. In 1977, the unit sought by the applicant union alone included some 525 employees and the total staff numbered more than 1,000.

On April 9, 1981, the Board notified the parties that it would hold a pre-hearing meeting on this new application on May 13 or 14, 1981. At the parties' request, the meeting was postponed until August 20, 1981. Meanwhile, the Board's investigation services gathered information.

On August 20, the Board met with the parties and the applicant union submitted four documents.

1. Preliminary submissions concerning the application of Board decision dated July 17, 1979.
2. List of TP positions, Operations: Teleglobe Canada's final position.

3. List of TP positions, Engineering: Teleglobe Canada's final position.
4. List of TP positions, Engineering, by group, showing whether or not the incumbents were professionals.

A note was added to the fourth document. It read: "The list was established on the basis of Teleglobe Canada's position regarding the professional status of said incumbents." (translation)

In order to place the dispute in its proper context, it is important to quote several passages from the preliminary written submissions mentioned in 1. above.

"The Board, in its decision dated July 17, 1979, certified the union for the unit described below:

[see page 3 above]

...

This unit has ... an intended scope which must be respected by the parties.

The Board described the intended scope of the unit, particularly on page 112 of its decision Teleglobe Canada, supra, pages 341; and 146:

'... incorporating the employees on the technical aspects of the company's operations as opposed to administrative and clerical aspects, even if the latter also encompass technicians in administrative methods or in clerical processes. ...'

Nature of the Problem:

After the Federal Court of Appeal dismissed the employer's motion to quash the Board's decision [see Téleglobe Canada c. Syndicat canadien des télécommunications transmarines, file no. A-487-79, October 3, 1980 (F.C.A.)], the parties engaged in discussions to find a way of applying the decision rendered by the Board. Discussions took place from December 1980 to March 1981, when the two parties ceased to meet because they had realized that it was impossible for them to agree on the precise scope of the bargaining unit the union represented.

...

Discussion of Problem:

It is not our intention here to file with the Board full submissions on this matter. We simply wish to draw the Board's attention to certain issues that arose as a result of the discussions between the parties.

Appended are three documents which should clarify the final position taken by Teleglobe Canada, the position that prompted our filing this application with the Board.

ITEM I: Technical aspect of the operation of the enterprise, as opposed to administrative and clerical aspects

The relevant portion of the description of the unit that raises the first series of problems is the following:

'all employees assigned to the conception, planning, setting up, operation, and technical maintenance and repair of equipment...'

Teleglobe Canada has adopted a restrictive interpretation... and concludes that the only services covered are Operations and Engineering.

The position adopted by Teleglobe leads us to raise certain questions...

- What of marketing services telecommunications representatives, who were formally members of the bargaining unit, and who, though they promote Teleglobe equipment, also participate in setting up and making innovations to equipment, working closely with the technicians?

...

- What of several employees in financial services, and particularly in administration, who use equipment of the same type as the technicians do, and who perform identical duties, drawing on the same data as the technicians already represented by the union? It should be noted with regard to these services, specifically in administration, that Teleglobe has in recent years been pursuing a policy of greater integration of information within the company, thus creating increasingly close ties between technicians in administration and those in operations.

These few examples underline the difficulties that Teleglobe Canada's position on the exclusion of all of its services could entail.

Teleglobe Canada, having excluded all the other services on the grounds that they are linked to the administrative aspect of the operation of the enterprise, continues in this vein by going so far as to exclude several positions within operations and engineering services, claiming that they are also of an administrative nature.

...

This first part of the problem thus raises several questions that must be resolved, namely:

1. Does the bargaining unit as described cover only engineering services and operations?
2. Which other services within the enterprise may be covered and to what extent?
3. Are all employees of engineering services and operations, with the exception of those already covered by another certification certificate, included in the bargaining unit the union represents?

ITEM II: Exclusion of professionals from the bargaining unit

Telelobe Canada's position with respect to the concept of 'professional' is that all persons who are members of or eligible for membership in a profession must be considered professionals within the meaning of the Canada Labour Code, namely: that they all, without exception, draw on their academic knowledge in the performance of their duties.

In examining Appendix III, the Board will see that a number of the so-called professionals are in fact merely eligible for membership in a profession, and that the concept of eligibility is imprecise, to say the least. It should also be noted that several positions that are excluded because they are held by professionals involve the same duties and sometimes the same title as other positions that are included because the incumbents are not professionals. Telelobe's position therefore involves an inconsistent application of the certification certificate, which will have detrimental consequences for the union in the near future.

There are too many non-professionals in positions that are identical or equivalent to those held by so-called professionals for the union to accept that the professionals in question do in fact, without exception, draw on their academic knowledge, as claimed by Telelobe Canada.

We must therefore ask the following questions:

- Are the individuals described as professionals by Telelobe drawing on their particular academic knowledge in the performance of their duties?
- If some of them do, is the bargaining unit as described applicable to Telelobe Canada and will it be in the future?
- If only some of the individuals draw on their particular academic knowledge, would it not be preferable to include all the positions in Telelobe's operations and engineering services whether or not they are held by professionals?

Conclusion:

On the basis of the foregoing comments, we think that the union's bargaining unit definitely includes all the engineering and operations services positions and also includes some positions in other services of Teleglobe Canada.

On the issue of professionals, we maintain that the position adopted by the employer makes the certificate inapplicable."

(translation; emphasis added)

We point out that in Teleglobe Canada, supra, the Board said:

"The Board has come to the conclusion that only those professionals working in technical positions involved in the design, planning, putting into place, operation and technical maintenance of the equipment of the employer, without having to make use of their professional knowledge, will be added to the existing bargaining unit. The professionals, of whatever discipline, who exercise their profession in their job will thus be excluded."

(pages 341; and 147)

As we will see further on, Teleglobe Canada was to file preliminary written submissions as well.

The Board therefore decided to hold public hearings, which were scheduled to begin on October 1 and 2, 1981. At the request of the parties, these dates were cancelled. In the meantime, the applicant union sent the Board additional preliminary submissions dated October 2, 1981, with a copy to the employer.

Without going into detail, we can say that these submissions do contain the following information and positions:

1. The disputes between the parties regarding the interpretation of the July 17, 1979 decision affect many employees.

2. The union alleges that Teleglobe Canada's position to the effect that all the professionals and all those eligible for membership in a profession are professionals within the meaning of the Code, and must therefore be excluded from its unit, makes the Board's order inapplicable.

3. Since the dispute involves exclusions from the unit determined by the Board, the union is requesting that the employer assume the burden of proof and justify the exclusions it is seeking.

Public hearings were held on October 13, 14, 28, 29 and 30, and on November 9, 10, 23, 24, 25 and 27, as well as on December 1, 1981. At the outset of the public hearings, Teleglobe Canada filed written submissions entitled "Teleglobe Canada's brief on the interpretation of the Board's decision of July 17, 1979."

Once again, in an effort to explain the context of the dispute between Teleglobe Canada and COTU, we will now reproduce important passages from Teleglobe Canada's written submissions.

"Teleglobe Canada fully acknowledges that the Board rejected the argument submitted by the employer at the time to the effect that a group of persons classified as technicians and professionals ('TP') constituted a separate group, distinct from the telecommunications operators and technicians who already belonged to the unit represented by COTU; it thus seems clear to us that the Board rejected the employer's claim that all incumbents in TP positions shared a specific community of interest.

Indeed, the Board determined that the scope of COTU's certification, which already included telecommunications technicians and operators, was not closed. Thus, the Board determined that the category of employees known as TPs would also be appropriate for inclusion in the same unit as the technicians and operators, on condition however that the intended scope of the original order... be respected.

...

... if certain persons holding TP positions are to be covered by the new certificate issued, it seems clear to us that these persons must be performing duties that are truly related to the technical aspect of the operation of Teleglobe Canada, more specifically, duties such as the conception, planning, setting up, operation, and technical maintenance and repair of equipment.

... Teleglobe Canada's interpretation of the amended bargaining unit can be partly summarized as follows: although the scope of the new certificate issued to COTU is certainly not limited to telecommunications technicians and operators, it was not the Board's intention to extend the scope of this certificate to include employees who were in no way involved in the technical aspect of the pith and substance of the employer's operations. Indeed, it seems clear to us that employees whose duties do not include the conception, planning, setting up, operation or technical maintenance and repair of telecommunications equipment are not covered by the certificate issued.

...

We submit that this is a rational, logical and entirely consistent interpretation of the new certificate...

We therefore maintain that, contrary to the arguments put forward by COTU in its additional submissions, Teleglobe's application of the decision rendered by the Board is based on the duties actually performed by the incumbents in the positions sought and not on its own administrative structures or merely on the written job descriptions.

...

Setting aside for the moment this first question concerning the nature of the duties actually performed by the incumbents in the positions sought and their relation to the Teleglobe equipment, we would like... to briefly explain... our position regarding the exclusion of professionals from the certification certificate.

...

...

... Our argument to the effect that this group of engineers, along with other professional engineers working in the same service [engineering] or in operations, actually use their specialized knowledge, can be proved and verified at the Board's scheduled hearings.

... we are taking the liberty of commenting briefly on the conclusions that the union draws from the fact that certain employees who are not 'professionals' within the meaning of the Code hold positions similar or identical to those of professional engineers. We submit that an analysis of the experience and qualifications of such employees shows that, although they do not

hold engineering degrees, they have, through many years of experience in a highly specialized area in an enterprise engaged in international telecommunications, acquired the same specialized knowledge held by engineers, which enables them to perform similar tasks. ...

...

The instant COTU application covers employees classified as TP working in four major Teleglobe Canada services, namely operations, engineering, marketing and integrated management services... The application also covers one financial service position and five administration positions.

...

... the unit represented by the union covers all employees performing duties related to the technical aspect of the employer's operation, namely, duties involving either the conception, planning, setting up, operation, or technical maintenance and repair of on-line equipment, with the exception of professionals within the meaning of the Code.

...

For these reasons, we submit that there are no grounds for amending the bargaining unit represented by COTU.

Should the Board decide... to amend the certificate by extending its intended scope, we would then request that the Board follow the rules it clearly set out in its 1979 decision and which, among other things, include the duty to verify the union's representative character with respect to any new group that may be added to the current unit."

(translation; emphasis added)

During the public hearings, the Board received a very large number of exhibits and heard some 20 witnesses.

This extensive evidence, which added to the information already accumulated in the review file (530-180) leading to the decision in Teleglobe Canada, supra, brought to light in mid-December 1981 a major disagreement between the employer and the union, COTU, on both the interpretation of the scope of the certificate and the meaning of the Board's decision. The disagreement concerned two fundamental issues: (1) While the Board had sought through this

decision to provide a new, more universal definition while at the same time respecting the original scope of the certificate held by COTU, it was becoming clear to the Board that it might have failed. (2) The application of the Code to professionals and the very definition of the term "professional" in the Code constituted major difficulties.

The following excerpt from the preliminary remarks made by one of Teleglobe Canada's counsel provides a good illustration of this disagreement:

"... aware of the fact that the approach taken in '76 and '77 was a comprehensive one and that the argument submitted and which the employer thought at the time valid was that TPs were a particular category of employees who shared a specific community of interest and we are aware of the fact that ... you did not agree with this submission ... and we accept that ... we think that what you meant was ... that the application seeking to include TPs with telecommunications technicians and operators does not change the scope. In other words, it may be appropriate to include certain TPs in the same unit... but now we have to see what these TPs do... are they connected to the technical aspect of the operation? ... we believe that the scope ... of the original certificate issued to COTU ... covered technicians and operators mainly, telecommunications technicians and operators. Therefore, people whose duties were directly related to on-line equipment, that is to the equipment ... to a certain extent, if not entirely, COTU seems to acknowledge that the Board wanted to draw a distinction between employees involved in the technical aspect and those involved in the administrative aspect. ...Except that we do not reach the same conclusions because ... we interpret 'technical aspect' ... as being employees whose duties are related to ... the pith and substance of the employer's operation, the transmission of international communications. So, there is ... this first question ... which we see in the file of 'technical aspect' versus 'administrative aspect' in light of your criteria and of the wording of the certificate, and of on-line equipment ... a secondary aspect of the file which is very important ... is the question of professionals ... that will come into play particularly ... where there is a heavy concentration of professional engineers, and also people ... who have experience, several years of experience in the technological area of international telecommunications, which enables them to do the same work on certain occasions, not all, but some have the

ability with their experience to do the same work as an engineer. ..."

(transcript of proceedings, October 13 and 14, 1981, pages 17-20; translation; emphasis added)

During the testimony of one witness, an exchange between counsel gave the Board an opportunity to observe the intensity of the disagreement between the parties on the interpretation of the scope or fundamental nature of the amended certificate issued by the Board on July 17, 1979. Counsel for the union said:

"... the purpose of my question is fairly obvious. It is to show the Board, in what I called the first stage, namely the clarification of the certificate, what the situation was when we appeared before the Board at the time [1976], and what was the result of the interpretation of an employer faced with that situation ... my examination of this witness ... my cross-examination, shows that indeed ... no position in any service whatsoever outside of operations, would have been given to the union by the Board as a result of the application before the Board at the time ... And, in operations, there would only have been ... 13 disputed positions that would have been granted with respect to what the Board termed an application seeking 129 positions, and of said application, still at the time, the Board said: this is an application that does not radically change the nature of the original certification certificate. So, if the application made at the time, affecting 129 positions, did not radically change the scope of the certificate at that point, and if the employer's interpretation confirmed by Mr. Foley [the witness] results in our adding 13 positions, excluding caretakers and maintenance workers, I think that it would be consistent with the direction of the hearings to clarify the scope of our certificate."

(transcript of proceedings, October 13 and 14, 1981, pages 114-115; translation; emphasis added)

Counsel for the union was no doubt referring to a passage from the Board's findings in Teleqlobe Canada, supra:

"9. The union wishes to add a group of technicians currently attached to the administrative category identified by the employer as Technician and Professional (TP). More precisely, we found during the course of the public hearings at least 300 employees in that category, of whom the

applicant wishes to add some 129 to its existing unit which already contains approximately 350 persons. ..."

(pages 337; and 143)

Counsel for Teleglobe replied as follows:

"... we think that the decision, by applying the criteria that you set out in the decision ... that 37 of the TPs would be affected, or 38, 37 ... you see that we consider that 37 positions would be included in the description of the unit, then, possibly, 69 others that might be included if we do not manage to convince you that the professionals are really using their acquired specialized knowledge ... we are not saying that you did not grant anything in '77, you indicated clearly that TPs could be included in the unit. ..."

(transcript of proceedings, October 13 and 14, 1981, pages 116-117; translation)

During the 1981 public hearings, the Board insisted that the parties explain in depth the meaning and content of the tasks performed by the category of employees classified by the employer as TP (technician and professional) and their understanding of the term "professional" within the meaning of the Code.

On December 1, all evidence had been produced, and the Board set the date of December 21, 1981 for the submission of arguments by the parties.

II

The controversy surrounding the application of the Board's decision amending COTU's certificate prompted the Board, out of concern for clarity and respect for natural justice, to instruct its services to post a notice on the employer's premises in the meantime, along with an explanatory note and a list of the disputed positions.

The text of the explanatory note follows:

"- EXPLANATORY NOTE -

(To be annexed to the Notice to the Employees in file 530-682)

On or about the 10th of August 1981, the Canada Labour Relations Board received a letter by the Canadian Overseas Telecommunications Union, which letter constituted an application under the provisions of Section 119 of the Code, an application for review which had already been deposited on or about March 31, 1981.

The essential paragraph in that letter stated:

'We ... ask the Board ... to agree to reserve one of these two (2) dates at its discretion in order to facilitate a meeting with the parties concerning our application to the Board to issue a decision clarifying and/or even modifying if necessary if it finds it appropriate, its decision rendered on the 17th of July 1979.'

A bare reading of this application was not sufficient for the Board to determine the exact nature of it.

The Board, therefore, met with the employer and the applicant union and subsequently set a series of public hearings during which the parties proceeded to a rather extensive session of verbal testimonies and evidentiary production of documents.

It now appears that the application of the applicant union could affect some employees of the employer who, according to the latter, would be excluded from the bargaining unit for which the union is certified, persons who, on the other hand, are not included in any other bargaining unit certified by this Board vis-à-vis this employer.

For the information of the employees, a list of persons who, the applicant union alleges, are covered by this present application, or who should be, together with the position of the employer as against this allegation, is annexed to the present explanatory note.

Exceptionally, the hearings before the Canada Labour Relations Board in this file have been recorded and the transcription thereof shall be completed on or about the 11th of December 1981. A copy of this transcript as well as copies of all documents adduced in evidence by the parties, will be available for examination at the Regional Office of the Board situated in Montreal at 1000 Sherbrooke Street West, 19th Floor, Suite 1912, beginning on the 11th of December next, by any employee encompassed by the present notice.

The Board has set a public hearing in Ottawa, on the 21st of December next at its Headquarters situated in the Lester B. Pearson Bldg., 125

Sussex Drive, Tower 'D', 3rd Floor, at 9:30 a.m. to hear the arguments of the applicant union and those of the employer in support of their respective positions regarding this application."

Although the debate surrounding the filing of COTU's application and the Board's eventual disposition of it through an order amending the union's certificate, accompanied by lengthy reasons for decision, and the discussions surrounding COTU's new application, which had been going on for several months in 1981, could not in all likelihood have escaped the notice of Teleglobe employees, the Board wanted to make them even more aware of the issues at stake.

It should also be pointed out that the notice invited employees to respond or even to intervene.

The notice and accompanying documents were posted for seven days, from December 10 to December 18, 1981.

The Board subsequently received in writing slightly more than 100 signatures from employees opposed to being included in the COTU unit. The Board forwarded these documents to the parties on December 21, 1981.

On December 21, 1981, the Board sat as agreed to hear counsel's arguments in review file no. 530-682. The arguments were not completed, and the Board adjourned to January 14, 1982 to finish the hearing. None of the employees who had written to the Board requested intervener status in this public hearing. However, on December 24, 1981, the Board received an application for certification from an association called Telecommunications, Technical and Professional Employees of Teleglobe Canada.

The Association wished to represent the following group of employees:

"All employees of Teleglobe Canada who are engaged in Commercial, Administrative and Traffic related activities including without restricting the Generality of the foregoing description, non-professional engineering, operational planning and control, procurement, policies and planning, marketing, financial analysis, off-line programs, linguistic services and public relations, with the exception of professional employees as defined by the Code including without restricting the Generality of the foregoing terms, chartered Accountants, chartered General Accountants, Engineers, Architects, lawyers, doctors, nurses, Industrial Relations Counsellors and persons who perform management functions."

This application had been filed on Board form no. 1, used in applications for certification (it is in fact the only form used). The form contains a certain number of items.

Item 5, "Approximate number of employees in the proposed bargaining unit": the Association entered 236.

Item 8, "Additional information that the applicant thinks will be of assistance to the Board": the Association wrote:

"To our knowledge, there is no trade union which is the certified bargaining agent covering any of the employees affected by this application. However, we are fully aware that, further to the Canada Labour Relations Board's decision of July 17, 1979, the Canadian Overseas Telecommunications Union has made claims and representations with a view to including in its bargaining unit some of the employees affected by this application. We strongly oppose all such claims."

This application became file no. 555-1705.

On December 29, 1981, COTU itself filed an application for certification. An examination of the application revealed a change in the union's position. We shall return to that

later. The application was accompanied by a letter bearing the same date, of which an excerpt is reproduced below:

"Attached is the application for certification the union is filing with the Board.

An application for review (file no. 530-682) is already before the Board, which is currently holding hearings on the matter but has not yet taken the application under advisement.

The union intends to maintain its application for review of the Board's decision rendered July 17, 1979. In case the application does not enable the union to obtain certification for the unit as defined in that file, we are filing with the Board a formal application for certification so that we may be recognized as the bargaining agent for said unit."

(translation)

This second application for certification became file no. 555-1707. It covered approximately 580 employees.

On January 21, 1982, the Communications Workers of Canada, Local 1653, also filed an application for certification. In this case, an examination of the application clearly showed that there had been a radical change in the union's position. We shall return to that later.

However, paragraph 8 stated:

"8. The purpose of this application for certification is to obtain an order from this Board to be recognized as the bargaining agent for a unit comprised of:

'all Teleglobe Canada employees in Canada assigned to clerical or administrative duties, excluding those covered by other orders of the Canada Labour Relations Board.'"

(translation; emphasis added)

Paragraph 11 stated:

"11. This application for certification affects a bargaining unit comprised of some 475 people."

(translation)

This application became file no. 555-1713.

These three new applications for certification forced the Board to suspend the completion of public hearings in file no. 530-682.

Because each of the applications infringed or could infringe on one or both of the other two applications, the Board ordered its services to carry out a new investigation in order to obtain from the parties sufficient information to define the precise scope covered by each of them.

On January 25, 1982, COTU raised the following point in a letter:

"It appears that the application for certification filed by the Telecommunications, Technical and Professional Employees seeks to obtain certification for a bargaining unit comprised of some of the employees for whom we are already certified."

(translation)

Teleglobe Canada wrote to the Board:

"... we request that you give us sufficient time to compare the three applications and, on the basis of the overlapping between the units proposed, to consider which unit(s) would, in the employer's view, allow for sound industrial relations and a sound bargaining policy."

(translation)

On February 5, 1982, the Communications Workers of Canada, Local 1653, in a letter to the Board concerning the application from the Telecommunications, Technical and Professional Employees of Teleglobe Canada (hereinafter referred to as TTPETC), wrote:

"... it appears to us that the unit sought by the applicant covers technical or technological duties as well as clerical and administrative duties. The unit conflicts not only with the bargaining unit held or sought by COTU (file nos. 530-682 and 555-1707), but also conflicts with the application for certification filed by our client, CWC Local 1653, on January 20, 1982 (file no. 555-1713)."

(translation)

On February 8, 1982, the Board received Teleglobe's written reply to these three new applications. In the covering letter, Teleglobe stated:

"In view of the confusion generated by the filing of three different applications for certification which may cover all or a part of the same classifications or persons, and of the fact that these applications for certification contain a reservation regarding the right to amend the description of the units described, the respondent employer reserves the right to amend the responses attached..."

(translation)

Paragraph 21 of the reply reads as follows:

"21. Although the Board has already heard extensive evidence in file no. 530-682 regarding most of the positions affected by this application [the TTPETC application] in operations, engineering services, marketing services and integrated management services, we request that the Board hold a public hearing..."

(translation)

The TTPETC opposed the COTU application for certification in a reply dated January 25, 1982, whose conclusions were:

- "- TO DISMISS the applicant union's application for certification;
- TO DECLARE the Telecommunications, Technical and Professional Employees of Teleglobe Canada the only bargaining agent for the employees sought by the applicant union's application; ..."

(translation)

This association did not file any written submissions contesting the application for certification filed by CWC Local 1653.

The Board's services completed their investigation and, on May 20, 1982, the Board's labour relations officer submitted his report to the parties and to the Board, but additional submissions from the parties were allowed and were received in early June 1982.

The Board informed the parties that, for the purposes of the disposition, it would consolidate the COTU application for review with the three applications for certification filed by TTPETC, COTU and CWC Local 1653. It set dates for supplementary public hearings, which were held on November 23, 24 and 25, 1982.

The scope of these hearings was defined in a letter from the Board dated November 9, 1982 and sent to all parties.

On the very first day of public hearings, November 23, counsel for TTPETC stated that he would be amending his application for certification.

He said:

"... For the record, I would simply like to point out to the Board that there have been two developments we consider ... major since we filed our application for certification last December.

First of all, our union held talks that lasted a certain length of time over the months preceding the date of the hearings scheduled for today. Through a resolution passed by the general meeting of our union held just yesterday, the members of the executive were authorized to affiliate with the FESA, the Federation of Engineering and Scientific Associations. ...

The second development ... which is more important from the point of view of the scope of our application for certification is related to the

nature and definition of our bargaining unit. When we filed our application for certification last December, there was no question of including professionals. ...

...

... The employees' intention at that time was eventually to include in their bargaining unit engineers and professionals. ...

...

... Meetings with members of the Federation have been planned. We had scheduled one for tomorrow, and it might take place on Thursday. At that point, we will be in a position ... to amend our application for certification and to delete the exclusion of professionals in the description of our bargaining unit. ..."

(transcript of proceedings, November 23, 24 and 25, 1982, pages 4-6; translation; emphasis added)

It is important to reproduce below two documents received by the Board on November 25, 1982 (the last day of the public hearings):

"November 24, 1982

Canada Labour Relations Board
Suite 1912
P.O. Box 548
1000 Sherbrooke Street West
Montréal, Quebec

In the matter of the Canada Labour Code (Part V - Industrial Relations) and an application for certification pursuant to section 124 of the Code by the Telecommunications, Technical and Professional Employees of Teleglobe Canada, applicant, Teleglobe Canada, employer, and the Canadian Overseas Telecommunications Union and the Communications Workers of Canada, Local 1653, interveners. (555-1705)

Dear Sirs:

We are hereby requesting that the Canada Labour Relations Board allow an amendment to our application for certification in the file mentioned above.

To that effect, you will find enclosed a letter duly signed by the members of the executive committee of the applicant union, requesting the amendment, and a copy of the resolutions adopted at the general meeting of its membership held on November 22, 1982 authorizing the filing of the amended application and/or, if required by the Board or by law, authorizing the filing of a new application for certification.

We are also submitting, at this time, membership cards duly signed by new members wishing to join our union so that the Board, pursuant to the discretion conferred by section 126(c), will be satisfied that the applicant union represents the majority of the employees affected at the time of the filing of the amended application.

As we had assured the Board that we would file an amended application before the end of the current hearings, it goes without saying that we remain entirely at the disposal of the Board and will provide any additional documents and/or information it deems necessary for the disposition of the instant application.

Yours sincerely,

(signed)
Laurent Taschereau"

(translation)

The following document was enclosed with this letter.

"TELEGLOBE TECHNICAL AND PROFESSIONAL EMPLOYEES
ASSOCIATION

November 25, 1982

Canadian Labour Relations Board
1000 Sherbrooke Street West
Montréal, Quebec

Dear Sirs:

RE: Application for certification by the
Teleglobe Technical and Professional
Employees Association
Your reference: 555-1705, 1707, 1713

We hereby file an amendment to our application for certification dated 24/12/81, so that the amended description of our bargaining unit will now read as follows:

'That the TPs Association shall represent all employees of Teleglobe Canada who are engaged in commercial, administrative and traffic related activities including, without restricting the generality of the foregoing description, professional and non-professional engineering and architectural, operational planning and control, procurement, policies and planning, marketing, financial analysis, offline programs, linguistic services and public relations with the exception of persons who perform management functions as well as employees already covered by a certification order.'

Yours sincerely,

David Park, President _____ (signed)
Gilles Limoges, Vice-President _____ (signed)
Neville Powell, Secretary _____ (signed)
Katharine Borcoman, Treasurer _____ (signed) "

Some 30 signed membership cards giving allegiance to the Telecommunications Technical and Professional Employees Association of Teleglobe Canada were filed at the same time at the Board's office in Montréal.

Counsel completed their arguments on the three applications for certification and the Board allowed them, in addition to the public hearings, to submit written replies by December 6, 1982. They did so.

On December 17, 1982, counsel for TTPETC withdrew in writing the application for certification filed on December 24, 1981 and amended on November 25, 1982. That same day, they filed another application for certification, on behalf of the Telecommunications Technical and Professional Employees Association of Teleglobe Canada. This became file no. 555-1843.

Counsel for each of the two applicant unions, COTU and CWC, objected in writing to this new application dated December 17, 1982.

III

Applications for certification must, under the Code, be filed within very specific time limits, according to the particular circumstances set out in section 124 of the Code.

The TTPETC application of December 1981, although it obviously sought some of the employees already covered by the certification certificate granted to COTU by the Board, was admissible. Indeed, the collective agreement between COTU and Teleglobe Canada was to expire on December 31, 1981. The COTU application was also

admissible and timely, for the same reason. The CWC Local 1653 collective agreement expired March 31, 1982 and its application for certification dated January 21, 1982 was therefore also timely under the provisions of the Code.

In February 1982, the Board had therefore to deal with an application for review from COTU for which only the arguments remained to be heard, and with three admissible and timely applications for certification.

The Board will first deal with the TTPETC application for certification dated December 24, 1981. Apparently, this application sought to bring together in a single, allegedly appropriate bargaining unit employees engaged in commercial, administrative and traffic-related activities, including activities carried out by non-professionals, operational planning and control, procurement, policies and planning, marketing and financial analysis, as well as activities related to off-line programs, linguistic services and public relations. However, the application excluded professional employees as defined by the Code, including chartered accountants, architects, lawyers and doctors, and also excluded nurses, industrial relations counsellors and persons in management positions.

The applicant had itself stated that the application affected approximately 235 employees.

The Board's thorough investigation, which took into account the description of the proposed unit and the clarifications provided by the applicant and the employer, revealed that in fact the unit affected approximately 280 employees.

An analysis of all these files showed that the unit covered a rather peculiar collection of employees. In general terms, the group consisted of employees who were not included in the CWC office and administrative employees' unit, and of all those employees whom the company had over the past few years classified as TP ("technician and professional").

On the one hand, there can be no doubt that this application was partly motivated by COTU's determination to clarify the scope of the certificate issued by the Board in 1979 through an attempt to include several TP employees, and by the employer's resistance to this. On the other hand and of more immediate import, the fact that triggered the filing of the application was the posting, at the Board's order, between December 10 and December 18, 1981, on the employer's premises, of a notice to all employees (see text reproduced on pages 17-18) indicating the possible scope of COTU's application for review. In this notice, the Board listed the positions that, according to COTU, were covered by its certificate, along with the names of the incumbents, and the employer's position which, in most cases, was contrary to the union's. This provoked an outcry that resulted in individual letters being sent to the Board and ultimately in the filing of this application by TTPETC on December 24, 1981.

There is also no doubt that this application, which claimed to unionize categories of Teleglobe employees who were not previously represented, proved upon examination to affect certain employees whom COTU already claimed to cover. This application also prompted CWC to change its position by filing an application for certification covering several of the employees sought by TTPETC.

Under section 126 of the Code, the Board must, inter alia, upon receipt of an application for certification, (1) determine the unit that constitutes a unit appropriate for collective bargaining and (2) be satisfied that a majority of employees, on the date the application is filed, wish to have the trade union represent them as their bargaining agent.

The Board will set aside for the moment the question of the appropriateness of the unit proposed by the TTPETC application.

Strictly on the basis of the association's stated understanding of the unit that it wished to represent, and taking into account the Board's investigation and the employer's submissions concerning positions to be excluded on the grounds of participation in management or performance of confidential industrial relations functions, the Board states that TTPETC did not represent the required majority of employees as at December 24, 1981. Between December 24, 1981 and November 1982, the Board received no evidence that any new members had joined.

As mentioned above, during the Board's public hearings in November 1982, counsel for TTPETC asked the Board for permission to amend the application. The Board refused to make an immediate decision regarding the admissibility of this request. It wanted to hear the other parties' arguments in this matter and had to have its services conduct a supplementary investigation on the impact of the amendment. A partial description of that impact follows:

- (1) While the original application did not propose as appropriate a unit encompassing professionals, this was now being requested. The intended scope of the new bargaining unit was therefore entirely different from that of the original unit sought.
- (2) On November 30, 1982 the report of the Board's supplementary investigation dealing with the amended application was distributed to the parties and to the Board. It showed that the unit no longer affected 280 employees, but rather approximately 350.
- (3) The association requested that the Board allow the filing of some 30 new membership cards.

Even if the Board were to decide that the amendment requested was admissible and, furthermore, that this amendment did not constitute a radical change in the scope of the application for certification, which would turn it into a new and different application, the Board determines, on the basis of an examination of the file, that the addition of some 30 new members would still not be sufficient to obtain the majority required for certification.

However, that was not all. An association seeking certification under the Canada Labour Code for the first time must establish its status as an association as defined by the Code. Part of the Board's investigation therefore deals with the association's constitution. On December 24, 1981, it was the Telecommunications Technical and Professional Employees Association of Teleglobe Canada that filed the application and produced by-laws. However, the request for amendment of November 25, 1982 was filed by a Teleglobe

Technical and Professional Employees Association. Was this a new union or had the association, while respecting its by-laws, simply changed its name? No explanation or evidence was provided to the Board in this regard. And, it was this new organization that, at the same time, asked that the Board allow the filing of new membership cards made out to the Telecommunications Technical and Professional Employees Association of Teleglobe Canada and not to the Teleglobe Technical and Professional Employees Association.

If this was a new applicant, not only could it not lay claim to any of the new members, it did not have any members at all.

Finally, this same supplementary investigation conducted by the Board following the request for amendment revealed that there was no evidence that the members in good standing at the time of the filing of the original application were still in good standing at the time of the request for amendment, on November 25, 1982. Indeed, the Board's Regulations provide that any member who has let six months elapse without paying union dues is disqualified.

Consequently, not only were neither the original TTPETC application nor the amended application supported by the required majority, both were sloppy and riddled with irregularities, some of them fatal.

For all of these reasons, the Board comes to the conclusion to dismiss the TTPETC application and close file no. 555-1705.

In any case, as mentioned above, the association itself withdrew the application and the requested amendment on

December 17, 1982. At the same time, it filed a new application for certification (file no. 555-1843), with which we shall deal later. Curiously, the association in question forwarded to the Board on January 3, 1983, to be filed with the application it had withdrawn, a series of documents completing its evidence.

The Board will now turn to the application filed by CWC Local 1653. We stated above that the application for certification filed by this union showed a radical change of position. Up until January 20, 1982, the intended scope of the union's certification certificate extended only to employees generally assigned to office duties. The union was now proposing as appropriate a new unit whose intended scope was very different and which, furthermore, covered a larger number of employees. The unit would in future comprise employees assigned to both office and administrative duties.

In fact, the union was risking its very existence within the enterprise. It was in a sense waiving its certification certificate and proposing a different appropriate unit. This new unit represented a larger number of employees. The union had majority support within the old unit, but it now had to show that it had majority support within the new unit it sought. Therefore, it needed more members. It had to recruit, have membership cards signed and obtain payment of the sums required by the Code and the Board Regulations in this respect.

Setting aside for the time being the question of the appropriateness of the new proposed unit, the union had to demonstrate that it had majority support in a unit which, according to the report submitted by the Board's

investigation officer, covered approximately 125 more employees than the one for which it was certified. In a letter appended to its application of January 20, 1982 the union estimated that the number of employees in the proposed unit was approximately 475. In fact, the Board's investigation showed that it was slightly over 500.

Yet, the Board states that the union enjoyed majority support on the date of the application for certification, even when all of the scenarios most unfavourable to the applicant regarding the content of the new unit are taken into consideration. Evidently, in order to achieve this, the union must have attracted a segment of the incumbents of positions sought by the TTPETC application.

With regard to the COTU applications, and still setting aside for the time being the question of appropriateness, the Board states, on the basis of its examination of the evidence and of its investigation, that this union had majority support on the dates the application for review and the application for certification were filed. Once again, these facts hold true for all scenarios.

IV

We shall now turn to the question of the appropriateness of the units proposed in these applications. This raises a fundamental problem concerning not only all of these applications, but also those applications over which the employer and the unions representing some of its employees had fought in the past.

This problem was the creation by the employer over a period of more than a decade of a classification or category of

employees identified as TP. In English, they are called "technical and professional employees" and, in French, "employés techniques et professionnels."

The employer eventually integrated this category of employees into its wage schedules. All Teleglobe employees, with the exception of the very top levels of management (and of their salary or compensation), belong to one of the following salaried groups:

1. management: this is obviously the wage scale for senior and middle managers;
2. TP: technical and professional employees;
3. technical supervisors: this is the wage scale for supervisors who formed an association and hold a certification certificate granted by the Board;
4. employees currently represented by COTU;
5. employees currently represented by CWC;
6. support staff (office employees excluded from the CWC certification certificate); and
7. employees working in Hawaii and belonging to an employees' association.

It must be understood that for each of these seven groups the scale is made up of several levels: for example, TP 1, 2, 3, and so on.

To give an idea of the wage schedule involved, the minimum and maximum rates for each group in 1977 follow:

Management: \$11,087 to \$37,550

TP: \$10,572 to \$28,151

Technical supervisors: \$15,280 to \$23,068

COTU: \$6,570 to \$20,329

Support: \$7,667 to \$17,619

CWC: \$7,575 to \$16,077

Hawaii: \$8,435 to \$22,168

The TP category is comprised of professionals, non-professionals and so-called "technical" employees.

Since the problem related to the professional employees was one of the major difficulties in these files, we will deal with it separately in another chapter of these reasons for decision. For the time being, let us simply point out that Teleglobe places in the TP group employees belonging to a profession (with a university degree), those whom it considers to be admissible to a profession, and those whom it considers to be the equivalent of professionals. Most of the professionals (with a degree) are engineers, but there are also architects and lawyers.

With regard to technical employees (the T in the TP category), the Board has gone to great lengths to gather all the facts regarding these employees.

A partial account of Teleglobe's development was given during the public hearings that resulted in the decision in Teleglobe Canada, supra. Evidence in file no. 530-682 and in file nos. 555-1705, -1707, -1713 and -1843 under consideration completed this account.

The company establishes, maintains and operates Canada's external telecommunications services and coordinates their use with the services of other countries. It owns a complete and modern international telecommunications system linked to global submarine cable and satellite networks.

Two major factors have influenced the evolution and development of the enterprise:

- (a) an incredible increase in international traffic; and
- (b) the ever increasing technological changes.

In the company's early days, employees included the traditional types that used to be qualified as "blue collar" and "white collar." Some of these are still there today. For example, there are still electricians. And there are still office employees.

There always were and still are technicians. In the past, they would have been qualified as "blue collar."

When certain groups of employees in the enterprise opted for unionization, they followed the traditional paths. The "blue collars" formed a union and the "white collars" formed another union, and both were certified. The first union is now COTU and the second, CWC Local 1653. Eventually, the technical supervisors availed themselves of the provisions of the Canada Labour Code and formed a union which was also certified: the Telecommunications Technical Supervisors Association (TTSA).

In the years immediately preceeding 1975, the enterprise was caught in a rush of technological change just as revolutionary advances in telecommunications caused it to expand considerably and broaden the ranks of its employees. It is at that point that the new employee classification, TP, was created.

Whenever a new position was established, the company decided whether it fit into the category of management, technical supervisor, support, office and falling within the wage scale negotiated with CWC, technician and falling within the wage scale negotiated with COTU, or into a new category, TP, with a different wage scale.

In the instant cases, the Board persistently sought to ascertain how the employer came to this decision, particularly in the case of the TP category and, more specifically, in the case of so-called "technical" employees.

A witness for the employer gave the following definition of this employee classification:

"... In the case of staff that is more specialized and is assigned generally or for the most part either to research or to consultation in the broad sense, or in the case of positions which we would want a professional to fill, they would more likely and, indeed, necessarily, enter into the technical professional category."

(transcript of proceedings, December 1, 1981, page 67; translation)

This is a very vague definition.

Later on, this same witness explained that the decision to classify a position TP was made jointly by personnel services and the manager requesting the establishment of the

position. In a sense, the manager puts in an order by describing the content of the new position. The witness added that the description included the following factors: (a) experience required, (b) formal education, (c) mental effort required of the incumbent, (d) relativity of the position with similar positions, (e) nature and degree of supervision required. This order leads to an initial definition by personnel services analysts, to decide whether the position falls in the management, support or TP category, for example. Ultimately, however, it is the decision made by the manager and his superiors that takes precedence. Once this first decision has been made, the position is evaluated within the category chosen and placed at the appropriate level of the wage scale for that category. If the category is represented by a union, discussions are held on this point with the union, otherwise not.

The Board returned several times to the question of the criteria used to determine whether a given position is TP or OU (commonly used to designate positions for which the incumbents belong to the bargaining unit represented by CWC-office workers) or belongs to another of the categories established by the employer.

The Board was not as interested in the evaluation criteria used within each category as in the criteria that would place a new position in the TP category rather than in another category. In other words, it was not a matter of determining why a TP would be classified TP-1, TP-2 or TP-3, but why and how it was determined that the future incumbent of a position would be a TP rather than a OU or M (manager).

One witness stated that in 90 to 95 percent of cases it was quite obvious from the job description provided by the manager whether a position was TP or OU, for example. In the remaining cases, the analyst relied on the evaluation criteria within each job category. To illustrate this, the witness added:

"... The tasks we regularly encounter in TP positions are functions related to analysis, conception, development, installation, improvement, testing, validation, comparison, co-ordination of systems ... or modes of operation ... The nature of positions in the OU category is that they mostly involve work of a clerical type ... consisting in recording and compiling data, doing calculations, filing documents or data, operating office equipment..."

(transcript of proceedings, November 23, 24 and 25, 1982, page 202; translation)

However, there was already before the Board a good deal of conflicting evidence regarding the concept put forward by the employer that the work performed by the employees in the TP category it had established was so different from the work required of "white collars" and "blue collars" that this constituted an argument against including them in the existing bargaining units.

The Board has no intention of interfering with an employer's prerogative regarding the establishment of categories of employees or with an employer's decision regarding the appropriate number of wage scales to establish. However, if the Board is to determine the composition and number of bargaining units, it must first understand the situation and is not necessarily bound by structures of this type which the employer has erected, although, as the Board has said and will say again, it will attempt, to the extent possible and taking into account a multitude of other factors, not

to interfere needlessly with an employer's administrative structures.

During the public hearings held in November 1982, while dealing jointly with the three applications for certification and COTU's application for review, the Board asked the following three questions, which are clear evidence of its continuing concern with these TP positions. The Board addressed these questions to the employer's representatives.

1. It is clear that in 1972-1973 the company had already decided to introduce what it called TPs into its system. There must at that point have been positions that already contained elements of the tasks that were later found in the content of the TP positions. How were these contents evaluated before the decision was made to establish the TP category?
2. What was Teleglobe's main reason for introducing the new TP category into its wage structure?
3. What were the criteria used at the initial point when a series of functions were selected that were subsequently classified in the TP category and in a separate wage scale?

It should be noted that, to this day, the Board has not obtained explicit answers to questions 1 and 2. The evidence adduced in response to question 3 was more satisfactory.

The Board was eventually able to hear testimony from the employer's chief of classification and organization, after succeeding in having five exhibits filed (38, 39, 40, 41 and

42), of which three (38, 39 and 40) were bench-mark positions for wage scales and two (40 and 41) were evaluation criteria used by analysts to evaluate the level of positions within the OU and TP wage scales. The chief was the person best qualified to explain to us the ins and outs of this employer's system. He supervised two classification analysts.

He conceded first of all that exhibits 38, 39 and 40 were not used for the purposes of the analysts' work.

The Board having noted that, according to exhibits 40 and 41, the evaluation criteria were the same in the OU category as in the TP category, at least insofar as the lower levels of the two categories were concerned, it asked the witness how the analyst determined that a position was either OU or TP. The witness answered that, before turning to the criteria contained in exhibits 40 and 41, the analyst would already have decided whether the position would be classified OU or TP. The Board insisted on being told how that conclusion was reached and the witness answered that it was based on the nature of the function. Asked to be more specific, he added that simply reading the draft job description provided sufficient grounds for making the determination.

The Board will now quote an exchange between this witness and one of the counsel involved.

"Q. ... If you do not use E-40 and E-41 as a work document for your ... analyst who has to do the job or to do the job in close cases. And if E-38 and E-39 are used for wage-related questions and not to decide whether a person will be, or a function will be, TP or OU, is there something somewhere you use as a work document or work tool to decide that a function you are going to create will be TP or OU, or do you simply go by your idea of it?"

A. It goes much farther than our idea of it. It is important, yes.

Q. Is there a document?

A. There is the whole structure at Teleglobe ... we do have several job descriptions that serve as a guide. Basically, it is a matter of judgement on the part of the analyst, and that judgement is reviewed first by me and if it really is ... close, it will be reviewed at other levels if contested. But basically there is no document that states: here is the list of OU criteria, and here is the list of TP criteria. It is our judgement, our practical knowledge of the context, the milieu and our past experience, that we draw on most in using 40 or 41.

...

Q. ... is it not true that since you joined the company, a fairly significant number of TP positions has been created?

A. It is true that a significant number has been created.

Q. Is it not true that since you joined Teleglobe, ... more than 100 TP positions have been created?

A. I believe that is true.

Q. So, if the method you use is an empirical one, is it not true to say that the more positions you classify as TP, the more your bench-mark system will orient you towards TP positions?

A. We are not as robot-like as that; our judgement can help us a bit."

(transcript of proceedings, November 23, 24 and 25, 1982, pages 272-274; translation)

To provide further background to the issues raised by the applications under consideration concerning TPs, the following additional comments, which are all based on the evidence, must be made.

The incumbent unions do not have any right as regards the employer's decisions to create new categories of employees. Teleglobe Canada's decision to add a TP category to its wage schedules could be, and was, made unilaterally. The unions do not participate in any way in the initial decision to place a position in the TP category rather than the OU

category or some other. It is only once a classification analyst has determined that a new position will be placed in a category which includes employees represented by a union that the union can intervene. By this point, however, the second stage of the process by which new positions are established has been reached: evaluation for the purpose of ranking the position within the applicable wage scale.

A comparison of wage brackets (1977 - and this is probably still true today) for each of the categories of employees in this enterprise reveals some other interesting facts.

The base wage at the first level of the category of employees represented by COTU is lower than the base wage for any of the other categories. This may be due to the fact that this bargaining unit includes the employees assigned to housekeeping services.

In 1977, employees generally assigned to office duties were found in two categories: the support category and the category comprising employees represented by CWC Local 1653. The director of labour relations for Teleglobe Canada described employees in the support category as follows:

"We have the office employee category, but here I must distinguish between unionized office employees, who are known as Local 1653 and the category of non-unionized office employees; these are, in fact, those excluded from 1653, of the office employee type. ..."

(transcript of proceedings, December 1, 1981, page 72; translation)

An examination of the file shows that it was possible to place a significant number of these employees in this category because of the exclusion concerning the confidentiality of their industrial relations functions.

It should however be noted that both the lowest bracket and the highest bracket in this wage scale for support employees are higher than the corresponding brackets in the wage scale for employees who perform some similar duties in the category of employees represented by CWC.

The base wage in the TP category is almost equivalent to the base wage in the management category and it is, relatively speaking, much higher than the base wage for the employees represented by COTU. Several factors may account for these differences. First, the TP category comprises not only technical employees but also professionals, persons "admissible" to professions and persons equivalent to professionals and, in order to attract professionals, the pot probably had to be sweetened. It is also in this category of employees that several computer specialists are found, inhabitants of that new Eden where labour market competition is quite brisk at the moment.

An examination of the highest bracket in each category shows that TPs are second only to the management category in this regard and that their maximum rate is much higher (still relatively speaking) than the maximum rate for the COTU category. They are followed by the support category and finally, in last place, the employees represented by CWC.

It must also be concluded that support employees, better paid than their counterparts in CWC, and having no union dues to pay, will not find the option of collective bargaining particularly attractive. It seems that for a long time this conclusion also applied to the majority of the employees in the TP category.

When the Board heard evidence in Teleglobes Canada, supra (July 1979), scant attention was paid to positions held by persons assigned to administrative tasks. No doubt the relatively recent development of a whole new generation of employees within the enterprise who are increasingly identified as technocrats (see British Columbia Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015 (CLRBR no. 58)) accounts for the fact that this has now become a topical subject at Teleglobes.

A few of these technocrats are associated with operations, but they are increasingly to be found in the administration sector. The application by CWC Local 1653 forces the parties and the Board to shed some light on this group of employees. The union, as we saw earlier, waived the intended scope of its present certification and proposed as appropriate a unit comprised of office employees, administrative employees, and even employees assigned to commercial activities.

Technology and data processing are also playing an increasingly important role and involving an ever greater number of employees within this enterprise, both in operations and administration. The evidence showed that data processing has now invaded administrative and office functions. But it has also, with the explosion of new technologies in the field in which this enterprise is involved, brought about considerable change at the operational level. Tasks that previously required manual work on the part of certain employees are now carried out by computers manned by the same employees.

These developments naturally led the employer to require better academic training of new employees. However, the

evidence also showed that employees in this enterprise, both old and new, are constantly taking courses; and this is true of all categories of employees.

This leads us to deal with another element of the evidence. The boundaries between categories are not impermeable; OU employees have become TPs and vice versa; COTU employees (technicians) have become TPs. The employer had to admit that employees who had been classified as TP according to the above-mentioned criteria were previously in the COTU category. Three examples among several are: scarab pilots, cable jointers and air conditioning system attendants. The evidence even established that employees performing exactly the same tasks were classified as TP in one of the enterprise's facilities and CT (communication technician) in a different one.

The employer has also adopted a modern method of improving the efficiency of its operations: project management. Projects, whether in research, implementing new equipment, new operating techniques, or development of new procedures, are conducted by teams bringing together engineers, technical employees, technicians, analysts and others. They are drawn from various services within the enterprise. There is thus continual osmosis of technical and academic knowledge as these projects are set up, carried out and concluded.

During the discussions surrounding the Board's 1979 decision in Teleqlobe Canada, supra, the employer argued that the TP category of employees it had created brought together employees sharing a community of interest that was quite separate and different from that of other groups of employees. The Board rejected this claim, and this was

acknowledged by the employer in file no. 530-682 under consideration (see page 11 above):

"Teleglobe Canada fully acknowledges that the Board rejected the argument submitted by the employer ... to the effect that a group of persons classified as technicians and professionals ('TP') constituted a separate group, distinct from the telecommunications operators and technicians who already belonged to the unit represented by COTU; it thus seems clear to us that the Board rejected the employer's claim that all incumbents in TP positions shared a specific community of interest."

The COTU application for review, the CWC Local 1653 application for certification, the COTU application for certification and, of course, the TTPETC application for certification, all of which seek to encompass TP positions, provided an opportunity for the employer to reassert its claim regarding the specific community of interest of employees in this category.

In 1979 and, once again, during the presentation of evidence and arguments regarding the files under consideration, the question of technicians and technical employees became increasingly important, whether the objective was to distinguish them or to assimilate them.

What is a technical employee? In what sense does a technical employee differ from a technician? Based on the definitions found in modern dictionaries, it is clear that a distinction must first be made between pure science and technical applications. Louis de Broglie in Physique et microphysique (Paris: A. Michel, 1947), wrote:

"Experts who cultivate pure science and those who concentrate on technical applications differ greatly in their state of mind and concerns ... the scientist in his research laboratory or study does not breathe in the same air as the technician in his industrial laboratory or office."

(page 337; translation)

We do not believe that many Teleglobe employees cultivate pure science, although the company does employ several professionals, especially in engineering. However, there are definitely many employees who are concerned essentially with technical applications.

Technique is a set of methodical procedures, based on scientific knowledge, used in production (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, volume 6 (Paris: Société nouvelle des imprimeries Paul Dupont, 1973), page 486).

It should be pointed out immediately that, although there are a few exceptions, Teleglobe does not manufacture products. It sells a highly specialized service involving a set of methodical procedures based on scientific knowledge, procedures that ensure that the service is provided according to the highest possible standards. Thus, technique makes practical applications of pure science and theoretical knowledge possible in the areas of production, economy and services.

What then is a technician? A technician is a person who understands and has mastered a particular technique. This technique enables him to apply science or theoretical knowledge to practical problems (Dictionnaire alphabétique et analogique de la langue française, supra, page 486).

How then can a technical employee be distinguished from a technician? According to the Board, no such distinction exists. A technical employee is a technician and vice versa.

Is there in fact a difference at Teleglobe?

In general, this enterprise started out with traditional "blue-collar" workers and trades people (for example, electricians), "white-collar" workers (office employees) and, with the development of telecommunications equipment, communication technicians. These technicians have been identified as "CT" (communication technicians). The evidence submitted to the Board in the files under consideration often referred to the current CTs. The first two unions established at Teleglobe were a "blue-collar" union made up of technicians and others and a "white-collar" union made up solely of office employees, at least in the beginning. However, there were also other types of employees at Teleglobe at that time. There were, among others, people with engineering degrees and, as telecommunication engineering developed, technicians or technical employees of all types, including those who arrived with the advent of modern technology. Computers and cathode-ray tubes appeared next at several levels of the administration and this led to the arrival of as yet another group of technicians or technical employees. No doubt, with the introduction of word processors, technicians or technical employees are now to be found even among the office employees group.

The evidence has therefore demonstrated to the Board that in November 1982 there were technicians working throughout Teleglobe Canada. The evidence has also shown that there were some in the COTU bargaining unit, and that the union claimed that its certificate covered an additional number of technicians in the TP category. In addition, while there were few technicians in CWC (office) bargaining unit before it filed its new application for certification, there is no doubt that a number of them in administrative positions are

covered by the intended scope of the new unit proposed by that union. In its original application, TTPETC was seeking to represent only those employees classified as TPs by the employer. However, by explicitly excluding professionals, the association was in fact proposing to set up a unit of technicians, including some already represented or being sought by COTU, and others that CWC was seeking to represent. There were a number of areas where the three applications overlapped.

Before making a final decision on the question of the appropriateness of the proposed bargaining units in the applications under consideration, we must now look at another characteristic of the staff working at Teleglobe Canada.

On a number of occasions earlier in these reasons, we have left aside the "professional" component in the category of technical and professional employees (the TPs). This is without doubt the most thorny problem found in these files.

V

In Teleglobe Canada, supra, in 1979, the Board excluded from the revised certification certificate granted to COTU all professional employees within the meaning of the Code, with the following distinction:

"The Board has come to the conclusion that only those professionals working in technical positions involved in the design, planning, putting into place, operation and technical maintenance of the equipment of the employer, without having to make use of their professional knowledge, will be added to the existing bargaining unit. ..."

(pages 341; and 147)

In its application for review, COTU is not seeking to include professional employees in the unit, but it does make the following distinction:

"On the issue of professionals, we maintain that the position adopted by the employer makes the certificate inapplicable."

(translation)

However, in its subsequent application for certification, the unit left out of its description of the proposed unit the specific exclusion that the Board had included in the revised certificate granted in 1979. In other words, while that certificate read: "all employees of Teleglobe Canada ... with the exception of professional employees as defined in the Code, ..." the definition proposed in the application for certification read as follows:

"all employees of Teleglobe Canada, in Canada, assigned to the conception, planning, programming and promotion of equipment, services and facilities, and to the setting up, operation and technical maintenance and repair of equipment and facilities."

(translation)

Moreover, in CWC's application for certification, there is no reference to excluding professionals. Finally, in TTPETC's original application, professionals were excluded, while the amended application sought, at the last minute, to include them, thereby changing the intended scope of the unit proposed by the applicant. The change is clear in view of the wording of the amended application and of the very specific provisions of the Code regarding professionals.

Why is the issue of professionals so thorny? Here we have to look at the modern phenomenon whereby many professionals have become salaried employees. At Teleglobe Canada, the

professionals in question are mainly in engineering. The problem is more pronounced in the case of Teleglobe Canada because it has a higher percentage of such professionals than do most other enterprises. This is probably because of the nature of Teleglobe Canada's work, combined with a decision on the part of management to attract individuals with the best technical qualifications to ensure that the company can be a leader in the industry. The problem of the engineers is made more difficult because of the statutory wording regarding professionals that the Board inherited in 1972.

It should be remembered that the first concepts of a federal labour code were laid down in a 1944 order-in-council, P.C. 1003, which was passed in wartime by the Parliament of Canada. This legislation did not give any special status to salaried professionals in the determination of bargaining units. See in this regard Quebec Federation of Professional Employees in Applied Science and Research, Unit No. 4 and Canadian Broadcasting Corporation, a decision of the Wartime Labour Relations Board (National), rendered on November 14, 1946. We will quote just one excerpt from that decision:

"The Board does not consider that for the purpose of collective bargaining, there is any important difference in interest between a professionally-qualified engineer and an engineer who has not such professional qualifications provided both are carrying on work of the same or similar nature and under similar conditions. Academic attainment cannot by itself determine the community of interest. Therefore the Board is not disposed to consider as appropriate a bargaining unit which seeks to distinguish between employees solely on the basis of professional qualifications. ..."

(page 2)

As a result of the pressure applied by professional associations, Parliament explicitly excluded from the

provisions of the Industrial Relations and Disputes Investigations Act, R.S.C. 1952, c. 152, the members of the so-called liberal or traditional professions: doctors, dentists, architects, engineers and lawyers.

In 1968, after an in-depth study, the Task Force on Labour Relations submitted its report to the government in which it made a host of recommendations, some of which concerned professionals.

Paragraph 441 of the report reads as follows:

"441. We recommend that the coverage of collective bargaining legislation be extended to employees who are members of licensed professions, provided that the bargaining agent be a separate organization from the licensing body. ..."

(Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968), (Chair: H.D. Woods), page 139)

This was one of several recommendations in which the Task Force suggested that collective bargaining be extended to groups of employees who were not entitled to it under existing legislation.

It should be noted that the recommendation did not create any special status for salaried professionals who chose collective bargaining.

The Task Force in fact added at paragraph 444:

"We recognize that there may be special bargaining unit determination problems in the case of many of the above groups. These problems do not lend themselves to legislated rules and regulations or to statutory guidelines. Consistent with our general recommendations with respect to bargaining unit determination, they must be left to the Canada Labour Relations Board."

(page 140)

The report of the Task Force eventually led to the drafting of a bill that was finally passed in 1972 and became Part V (Industrial Relations) of the Canada Labour Code.

There is a world of difference between the recommendations on professionals made by the Task Force and the provisions passed by Parliament.

Let us see.

Section 125(3) of the Code reads as follows:

"125.(3) Where a trade union applies under section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2),

(a) shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining;

(b) may determine that professional employees of more than one profession be included in the unit; and

(c) may determine that employees performing the functions, but lacking the qualifications of a professional employee, be included in the unit."

However, the legislator did not stop there. In section 107 of the Code, he added the following "definition" of professional referred to in section 125(3):

"'professional employee' means an employee who

(a) is, in the course of his employment, engaged in the application of specialized knowledge ordinarily acquired by a course of instruction and study resulting in graduation from a university or similar institution, and

(b) is, or is eligible to be, a member of a professional organization that is authorized by statute to establish the qualifications for membership in the organization."

One can draw an initial conclusion. Only two elements of the recommendations of the Task Force were taken into account:

1. access to collective bargaining by professionals was once again recognized, and
2. because of the general provisions regarding the Board's discretion in determining the appropriateness of a bargaining unit, which include the provisions of section 125(3), a burden was placed on the Board to breathe life into this new legislation.

Although the Task Force's study no. 2, Professional Workers and Collective Bargaining, which had partly inspired the team's recommendations, emphasized that flexibility should be given more prominence in future legislation (see also Shirley B. Goldenberg, Task Force on Labour Relations: Study no. 2, Professional Workers and Collective Bargaining (Ottawa: Privy Council, December 1968), page 100), the Board instead found itself in a mine field.

The legislative provisions quoted above undoubtedly reflect the intense lobbying and pressure surrounding this bill before it was passed. There were four main sources of intervention:

1. The professional associations themselves. Generally speaking, they have always fought access to collective bargaining for their members, even though a growing proportion of them were becoming salaried employees: professional status was thought to be incompatible with collective bargaining. Collective bargaining as practiced by trade unions could do nothing to recognize, protect and promote the needs and objectives of professional groups.

This was the original position of professional associations in Canada, around 1948, at the provincial and federal levels. At the federal level, as we have seen earlier, this position eventually won out, since professionals were again excluded in the 1952 Act.

We must then turn to the provincial jurisdictions to observe the evolution of working conditions for professional salaried employees both in the private and public sectors. Ontario and Quebec, in particular, saw the struggle for many salaried professional groups to gain access to collective bargaining, or at least a form thereof. Professional associations, especially engineering associations, were besieged by sizeable groups of their members who eventually gained access to collective bargaining, either by law or other methods.

2. New professional associations. Between 1900 and 1970, increasingly large groups of employees came onto the labour force with newly recognized academic diplomas in new sciences or fields. Enthusiasm for higher learning made more accessible by the state also played a role. Being a professional became fashionable. Several new specialties were recognized as having professional status.

One consequence of this phenomenon was that many new employee groups tried to win acceptance of the fact that their new scientific or technical knowledge meant that their community of interests was different and separate from that of other employees. A need arose to adapt to the coexistence of traditional professions along with newer ones, which were more likely to include salaried employees. Early on, many of these new professions, for example teachers and nurses, sought access to collective bargaining.

3. Large private sector companies as well as large Crown corporations under federal or provincial jurisdiction (for example, Hydro-Quebec, Ontario Hydro, Atomic Energy of Canada Limited and Bell Canada) found it beneficial to hire professionals, particularly engineers whose salaries cost less than the fees of consulting firms. But at the same time, they attempted to ensure a wider scope of action in hiring and using a large number of non-professional employees assigned to duties that were closely related to those performed by licensed professionals. Here again, the economic advantages of this position are quite obvious. Many salaried professionals in these companies realized that they could not hope to achieve the same level of income as salaried employees as could their colleagues in private practice or consulting firms. They attempted to do so through promotions or transfers to managerial or administrative positions. Generally speaking, companies did not discourage such initiatives. This is why today, professionals can be found in the highest strata of executive positions in a large number of major corporations. This begs the question: to what extent are these professionals in managerial or administrative positions applying their specialized professional knowledge in their respective jobs?

4. Lastly, the unions representing employees whose duties revolve around those of professionals seek to protect the access of their members to those duties. Moreover, as soon as their members acquire some professional expertise through long working experience with professionals, vigilant unions request that their certification certificate cover those additional functions.

These four major groups of our society intervened in the months that preceded the passage of section 125(3) of the Canada Labour Code in June 1972. (On this subject, see as examples: Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration, 4th Sess., 28th Leg., May 24, 1972, brief by The Chemical Institute of Canada in Appendix A-9, page 16:45 et seq.; brief by the Association of Engineers - Bell Canada in Appendix T, pages 13:62 and 13:63; and brief by the Professional Institute of the Public Service of Canada in Appendix L, page 12:102 et seq. See also Canada, Senate Debates, Canada Labour Code, June 30, 1972, page 566; and July 4, 1972, page 578 (the Hon. H. Carl Goldenberg).) They showed a well-documented knowledge of various recent legislative changes affecting professionals in provincial jurisdictions. Thus, after major controversies, including some unlawful strikes, in 1964, Quebec gave members of numerous professions access to collective bargaining. However, they had to be regrouped separately, each in their own profession (Labour Code, R.S.Q. 1964, c. 141, sections 1(m) and 20). (See also: John H.G. Crispo, ed., Collective Bargaining and the Professional Employee (Toronto: Centre for Industrial Relations, University of Toronto, 1966); Gérard Hébert, "La g n se du pr sent Code" in Le Code du travail du Qu bec (1965) (Qu bec: Les presses de l'Universit  Laval, 1965), particularly page 30; Jean-R al Cardin, "Le droit d'association, son extension, ses limites" in Le Code du travail du Qu bec (1965), supra, particularly pages 50, 51 et seq.; and Claude D'Aoust, "L'unit  d'accr ditation des professionnels" (1971), 26 Industrial Relations 768.)

Since 1970, Ontario has been allowing professional engineers, as well as the members of a large number of less

traditional professions, to be certified. However, architects, dentists, lawyers, physicians and surveyors (!) continue to be excluded from the definition of employee found in the Code. Moreover, the law supported a separate certification certificate for the engineering profession. They could be included in a bargaining unit made up of other employees, but to do this, a majority of the engineers affected had to agree. (See the Labour Relations Act, R.S.O. 1970, c. 228, section 1(n) and 6.)

For examples of the application of this amendment concerning engineers, see: Northern Electric Company Limited, [1975] OLRB Rep. March 164, which was reviewed in Re Northern Electric London Professional Association and Ontario Labour Relations Board et al. (1976), 14 O.R. (2d) 273 (H.C.J., Div. Ct.); see also Spar Aerospace Products Ltd., [1979] OLRB Rep. July 700; and RCA Limited, [1980] OLRB Rep. Sept. 1316.

In 1972, Manitoba passed an amendment giving professionals access to collective bargaining according to a formula similar to Quebec's (Labour Relations Act, S.M. 1972, c. 75).

By May 1972, the term professional had already disappeared from labour legislation in Saskatchewan. A professional was thereby considered an employee like any other (The Trade Union Act, 1972, S.S. 1972, c. 137).

Since May 1971, the term employee includes professionals in New Brunswick (Industrial Relations Act, S.N.B. 1971, c. 9).

When the Board rendered its decision in Teleglob Canada, supra, in 1979, these pressure groups had seen other

legislative developments concerning professionals. In 1975, in British Columbia, professionals could be included with other employees in a bargaining unit, but the Board had to ensure that the majority wanted to be included (Labour Code of British Columbia Amendment Act, 1975, S.B.C. 1975, c. 33, section 152A). In 1977, Quebec amended its Labour Code removing all references to any special treatment for professionals (An Act to amend the Labour Code and the Labour and Manpower Department Act, S.Q. 1977, c. 41, section 11). (See also: Rodrigue Blouin, Le Code du travail du Québec 15 ans après... (Québec: Les presses de l'Université Laval, 1979), particularly page 22.)

Also in 1977, Newfoundland included professionals in its definition of the term employee and specified that a unit made up strictly of professionals could be appropriate and that it could include employees whose duties were closely related to those performed by professionals (The Labour Relations Act, 1977, S.N. 1977, c. 64, sections 2(1)m and 39(1) and (2)).

In summary, here was the situation in Canada, therefore, when the Board heard the arguments of the parties in the case under consideration in 1982 and beginning of 1983.

1. In two jurisdictions, Quebec and Saskatchewan, the legislation made no specific reference to professionals. The members of both traditional (liberal professions), or newer professions were subject to the same conditions as other employees with regard to obtaining the right to collective bargaining.

If we recall the aforementioned recommendations of the Task Force, major excerpts of which have been quoted on this

subject earlier, we note that, in fact, both these jurisdictions fully adopted the Task Force approach.

2. At the other end of the spectrum, a few jurisdictions completely exclude members of traditional professions (law, engineering, medicine, architecture, etc.), namely Prince Edward Island, Nova Scotia and Alberta. Ontario is another case in point. Except that for the latter, we have seen that engineers have access to certification according to certain criteria since 1970.

3. At the mid-point of this range of jurisdictions are British Columbia, Newfoundland, Manitoba, New Brunswick and the federal government. Generally speaking, in each of those cases, the legislator has inserted a definition of professional. This definition incorporates the content of the professional's duties as well as membership or eligibility for membership in a professional association or corporation. Except for the federal government, the rule in each of these jurisdictions is that separate certification for each profession is preferable unless the members themselves decide otherwise. The federal level is unique in that, although the wording of the Code establishes a strong presumption in favour of a separate bargaining unit, it still leaves the final decision to the Board in determining what is appropriate. There is no obligation to ascertain the wishes of the group of professionals sought.

We should add in passing that in the United States, pursuant to the National Labor Relations Act, professionals do enjoy special status although this does not go as far as is the case in Quebec and Saskatchewan. However, membership in a professional association is not part of the definition of professional as is the case in the jurisdictions mentioned

in paragraph 3. The key elements are education and the content of the duties performed by the professional. Nevertheless, there is a presumption that certification will be separate unless the professionals involved wish otherwise. (See sections 2(12) and 9(b)(1) of the Labor Management Relations Act, 1947 of the United States of America. See also Labor Relations Cumulative Digest and Index (Washington, D.C.: The Bureau of National Affairs, Inc., 1976), page 1440 et seq.)

Coming back to federal legislation, when the strong presumption favouring a separate union for each group of professionals is added to the series of rules that the legislator included in section 125(3) and through the very definition of professional contained in section 107, the Board cannot help but express the opinion that it does not have the latitude or flexibility recommended by the Task Force, supra. Let us give a first example. The presumption favouring separate units for professionals partially prevents the Board from allowing its own criteria of community of interest to come into play in determining the appropriateness of a bargaining unit.

Moreover, Board jurisprudence on the subject of section 125(3) of the Code has been minimal since 1973. Very few applications for certification involve professionals, at least so-called traditional professionals. In fact, there has only been the case of Bell Canada (1976), 19 di 117; [1976] 1 Can LRBR 345; and 76 CLLC 16,016 (CLRB no. 62), pages 119; 348; and 472, which led to a sharp confrontation of the Board with the new provisions of the Code.

The Board did, of course, in that case, establish a few general criteria for its interpretation, but mostly it has

been stymied by serious problems of interpretation raised by the wording of the legislation.

It involved a group of employees comprised of professional engineers and a few architects (approximately 500) who were proposing a separate unit made up of members of these two professions. The Board dismissed the application; the reasons issued did not provide detailed analysis of the complexities of sections 107 and 125(3) of the Code. Only the cases involving Teleglobe Canada truly required that the Board come to grips with these provisions.

First of all, let us consider the definition found in section 107. It contains two paragraphs linked by the word "and."

*"'professional employee' means an employee who
(a) is, in the course of his employment, engaged
in the application of specialized knowledge..."*

This individual is therefore a salaried employee.

Emphasis is placed on the nature of the duties to be performed: "in the course of his employment." That is the test. Holding a university degree is therefore not sufficient. One must be required to use that specialized knowledge because of the content of the duties to be performed. We must therefore assess the duty in order to determine whether its performance requires enough specialized knowledge to qualify all of it as being the work of a professional. The text continues:

"... ordinarily acquired by a course of instruction and study resulting in graduation from a university or similar institution..."

Therefore there are in fact three issues: (1) "engaged" in the course of his employment, (2) "ordinarily" and (3) "similar institution."

(1) To what extent must the person be "engaged"? The Code is silent on that point. Fully or partially? Regularly or sporadically? Predominantly? How predominantly?

(2) "ordinarily": does the addition of the qualifier allow us to presume that some employees may extraordinarily be considered professionals even though their specialized knowledge was not acquired at a university? It would appear so. As a matter of fact, many employers adopt this position, as we will see later. Yet, the conjunctive "and" used in the definition seems to preclude this possibility.

"'professional' ...

... and

(b) is, or is eligible to be, a member of a professional organization that is authorized by statute to establish the qualifications for membership in the organization."

(3) "graduation from a university or similar institution" (emphasis added). It may seem that this wording provides the Board with some latitude. It is true theoretical knowledge can more and more frequently be acquired elsewhere than in universities, particularly outside the traditional professions.

"... In a labour relations context, should a university degree be such a crucial factor in separating professional employees from other workers? For example many technologists in the fields of health, science and communications are graduates of both post-secondary institutions other than universities, i.e. community colleges, institutes. Would they come within the phrase 'similar institution' and should they be so

characterized as a matter of policy? Many of these occupations possess codes of ethics and their associations often play a vital role in developing the curriculum by which members are educated. ..."

(George W. Adams, "Collective Bargaining By Salaried Professionals" (1977), 32 Industrial Relations 184, page 194)

Unfortunately, because of paragraph (b) which follows in the definition, the Board's latitude is highly illusory, if indeed it ever existed. In the final analysis, it is the professional associations that decide whether the diplomas conferred by institutions other than universities are indeed given by institutions similar to universities.

"'professional employee' ...

... and

(b) is, or is eligible to be, a member of a professional organization that is authorized by statute to establish the qualifications for membership in the organization."

(emphasis added)

With regard to paragraph (b) of section 107, there is no doubt that the interpretation of the conjunction "and" between this paragraph and paragraph (a) is that this forms a whole: both conditions must be met in order to be considered a professional.

However, this paragraph contains another Pandora's box: "or is eligible to be." Even though the wording seems to indicate that Parliament still wishes to make of the professional associations the sole and ultimate arbiters of what constitutes eligibility, must the Board interpret the term "eligible" as meaning that a person must fulfil all the conditions required for membership, except professional license? For example, consider the person who temporarily lacks the funds to pay the permit or license fees. In such

a case, this person would not be about to become a professional, or a quasi-professional employee, or the equivalent of a professional because he still had 2 out of 20 credits to obtain, etc.

While the definition of professional in section 107 contains problems and ambiguities, section 125(3)(a) which deals with the certification of these professionals is in itself a legal morass of exceptions and nuances.

It reads as follows:

"125.(3) Where a trade union applies under section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2),

(a) shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining; ..."

As the Board stated in Bell Canada, supra:

"... Nevertheless, the wording of paragraph 125(3)(a) seems to indicate a clear legislative preference for units comprising only professional employees. ..."

(pages 123; 350; and 473)

The Board perceived an unquestionable legislative preference for separate professional units: "the Board ... shall determine." What is more, this preference is found in the same section of the Code which gives the fullest discretion to this same Board with regard to all other employees, except private constables. We must therefore take this into account. This preference has been underlined.

In other words, except for professionals and private constables, the legislator invested the Board with the fullest discretion in determining what constitutes an appropriate bargaining unit.

"125.(3) ...

...

(b) may determine that professional employees of more than one profession be included in the unit; and ..."

(emphasis added)

That paragraph reinforces the presumption that the appropriate unit preferred by the legislator at paragraph (a) is a separate unit for each profession. Thus, while the Board shall determine at paragraph (a), it has discretion at paragraph (b) with respect to members of more than one profession: it "may determine."

"125.(3) ...

...

(c) may determine that employees performing the functions, but lacking the qualifications of a professional employee, be included in the unit."

(emphasis added)

It is therefore apparent that, in paragraph (c) as in paragraph (b), the Board is given back the discretion which was removed in paragraph (a).

Yet, what is a person who performs the duties of a professional but lacks the qualifications of a professional? Are the words "functions ... of a professional" equivalent to "in the course of his employment" in section 107 or is a further dimension being added? Do the words "qualifications of a professional" add another meaning to the words "engaged in the application of specialized

knowledge" in section 107? Or are we referring, albeit with different wording, to the two conditions (a) and (b) found in section 107 to acquire the status of professional? Does the person referred to in paragraph (c) perform all the functions of a professional, part of those functions or most of those functions? A comparison of the French and English wording seems to indicate that that person must perform all these functions. The English wording reads "performing the functions" while the French reads "exerçant les fonctions." Yet, by restricting the conditions for adding people to a professional unit, this interpretation seems to go against the general intent of section 125(3).

Upon reflection, it is impossible not to get the impression that the legislator tried to please everyone and that all pressure groups managed to have a significant portion of their interests inserted in the provisions: traditional professional associations, groups of "new professionals" whose specialized knowledge is not yet incorporated in university programs, and traditional unions that did not want to see opportunities for their members to progress in the employer's structures vanish through the birth and growth of new closed categories of employees.

In addition, large enterprises have a growing need for employees who have the specialized knowledge of professionals but, for obvious economic reasons, are not prepared to deprive themselves of the opportunity of attracting other employees capable of performing a large part of the duties performed by these professionals. Lastly, there are the salaried traditional professionals themselves. They have been very hesitant about opting for collective bargaining. Again, this is just an impression, but one based on their history of highly ambivalent

behaviour. (On this subject, see, for Canada, J. Finkelman, "Comments on Bargaining for Professional Employees," speech before the Professional Institute of the Public Service of Canada, November 1975; David M. Beatty and Morley Gunderson, Collective Bargaining Versus Self-Regulation for Employed Professionals (Toronto: Centre for Industrial Relations, University of Toronto, 1979); particularly Katherine Swinton, The Employed Professional (Toronto: Osgoode Hall Law School, 1979); Fraser Isbester and Sandra Castle, "Individual or Collective Action? A Problem for Professional Engineers" (1972), 27 Industrial Relations 364; and Donald Fraser and Shirley B. Goldenberg, "Collective Bargaining for Professional Workers: The Case of the Engineers" (1974), 20 McGill Law Journal 456. For the United States, see Eileen B. Hoffman, Unionization of Professional Societies (New York: The Conference Board Inc., 1976); Felicitas Hinman, ed., Professional Workers and Collective Bargaining (Los Angeles: Institute of Industrial Relations, University of California, 1977); and Robert L. Aronson, "Unionism Among Professional Employees in the Private Sector" (1985), 38 Industrial and Labor Relations Review 352.) One cannot help but draw a parallel between the hazards of economic conditions for these professionals and the ambivalence that legislators in several jurisdictions have sought to translate into legislation affecting professionals. We may well question whether the growing number of professionals at various management levels in business is a function of their affinity with management objectives, which they have also commented upon, or if it is a function of their economic desire to earn more money via this route, as opposed to remaining strictly employees and applying their specialized professional knowledge in the course of their employment. The latter phenomenon complicates the task of interpreting

the complex provisions of the Code. For example, is a professional engineer working in a marketing department administered by another engineer engaged in the application of specialized knowledge in the course of his employment?

It is against this legal background that we must solve some of the problems related to appropriate units in the applications before us.

VI

Let us go back to COTU's application for review (file no. 530-682). As was mentioned at the beginning of these reasons, and as the evidence in this file has established beyond any doubt, the Board's decision in Teleglobe Canada, supra, in 1979, far from facilitating the establishment of clear delineation with regard to the certification certificate held by COTU, unfortunately seems to have fomented new grounds for dispute between the parties involved. Let us recall that the Board had described the unit as follows:

"all employees of Teleglobe Canada, in Canada, assigned to the conception, planning, setting up, operation, and technical maintenance and repair of equipment with the exception of professional employees as defined by the Code, ... but including all employees of the employer in Canada assigned to building maintenance functions."

(pages 341-342; and 147)

The fact that Canada was mentioned twice effectively excluded employees of this company in Hawaii who were members of an employee association.

The specific reference to building maintenance became necessary because, in 1979, the Board had had to resolve the issue of whether employees assigned to those tasks could

constitute a separate bargaining unit or whether it was better to include them in an existing unit. The Board had opted for including them in the COTU unit, mainly for two reasons: (1) these employees were scattered throughout Canada; and (2) they were few in number. The viability and effectiveness of a separate unit under such circumstances were uncertain. In addition, another unit would have had to be added, a situation the Board is seeking to avoid.

Upon receipt of this new, universal wording of COTU's certification, the employer adopted a narrow interpretation as shown in the evidence. A summary follows:

1. The Board excluded professionals from the certification certificate provided they applied the specialized theoretical knowledge of their profession in the course of their employment. This is in fact the case of all professionals employed by Teleglobe Canada: therefore they are all excluded.

2. The highest concentration of professionals is in the field of engineering and they are all excluded since, according to the employer, even if the majority is involved in conception and technical planning, they are subject to item 1 above. Other professionals are excluded for the same reasons.

3. In addition, the employer contends that a significant number of its employees are professionals, even though they are not licensed by a professional association, because they are eligible for membership in those associations. The evidence showed myriad examples of employees who were lacking only a few credits. Moreover, several have diplomas

conferred by institutions similar to universities and are therefore excluded professionals.

4. Lastly, there are those whom the employer has called "equivalent professionals." According to the employer, these are employees who, as a result of many years of experience in a highly specialized field within the company, have acquired the same specialized knowledge as professionals holding university degrees and were thus capable of performing the same duties:

"... such persons perform the functions of a 'professional' within the meaning of the Code by using equivalent specialized knowledge that they have simply acquired in a different way than an engineer. We feel it is perfectly logical to believe that these 'equivalent professionals' share a community of interest with professional engineers within the meaning of the Code, since they possess similar specialized knowledge and skills enabling them to perform the same work."

(Teleglobe Canada's Memorandum Regarding the Interpretation of the Board's Decision Dated July 17, 1979 (exhibit no. 5); translation; emphasis added)

5. Several of these professionals in the wider sense described in 2, 3 and 4 above, hold administrative positions and are not assigned to technical conception and planning. Therefore, they cannot be included in COTU's bargaining unit.

6. The Board uses the term "equipment" in the wording of the certification certificate. The employer makes a distinction between employees who work with mechanical equipment or on-line computerized equipment and those who work with off-line equipment. According to the employer, the certificate covers only the former.

Given this interpretation, it is not surprising that the parties have not been able to reach an agreement and that the union has come back to the Board to request that it resolve the issue. The Board has quoted the union's grievances on pages 7 to 9. The evidence has revealed that the employer's interpretation led to the concession of a limited number of new positions to be covered by COTU's certificate following the 1979 decision.

For its part, the Board refers again to the interpretation problems arising from sections 107 and 125(3) that it has just examined and the illustration thereof in the employer's position as just reported above.

Despite the extensive evidence before it, the Board finds it difficult to accept that all professionals employed by Teleglobe Canada who hold a license or diploma apply the specialized knowledge of their profession in the course of their employment within the meaning of the Code. The Board is also hesitant in light of the fact that persons who do not yet hold degrees are in fact "eligible." The evidence revealed that the eligibility criteria vary from one professional association to another, even within the same field. On this point, Parliament has deferred to the professional associations. Moreover, the Board noted the evidence dealing with "professionals" whose degrees are not accepted by the authorities of Canadian professional associations, but whom the employer excludes or wishes to exclude because they are "equivalent professionals."

With regard to that last expression and what it encompasses in the eye of the employer, the Board can only conclude that these persons are technicians and that, within COTU, there are technicians who, according to the evidence, have also

acquired the same specialized knowledge as professionals holding university degrees, through many years experience in a highly specialized field, allowing them to perform similar duties. To quote the employer "... such persons perform the functions of a 'professional' within the meaning of the Code by using equivalent specialized knowledge that they have simply acquired in a different way than an engineer. ..." The Board feels that this would be just as applicable to technicians in the COTU unit.

With regard to the distinction made by the employer between on-line and off-line equipment, the evidence revealed many examples of interaction between on-line and off-line computers.

The certification application filed by TTPETC before the Board ended the hearings into this application for review, would change many of the givens in the problem of appropriate units.

The wording of this association's application (file no. 555-1705) created difficulties for the Board during its investigation to determine its exact scope. This wording is reproduced on page 19 above. A simple reading of this wording enables one to understand the difficulties to which we refer. This is a rather heterogeneous list of some of the enterprise's activities. In fact, the title adopted by the association, coupled with the exclusions contained in the wording, are very revealing of the intended scope of the unit sought. The association claimed to encompass all employees classified in the TP category by the employer, with the following major exception: Professionals within the meaning of the Code. However, we have just seen the difficulties inherent in the interpretation of this

definition. It can encompass persons other than university graduates who are members of professional associations. As if to point out the types of professionals it wanted to exclude, the association added the following list in its proposed wording: lawyers, physicians, engineers, chartered accountants, architects, nurses and labour relations counsellors. We note that some of these professions are traditional or liberal, some are "new" and do not require university degrees but rather a certificate from a "similar institution."

Moreover, this company, like many modern companies, does not classify its professional employees by their professional title. An analysis of the complete list of Teleglobe employees in January 1982, which is included in the file, shows that, except for lawyers and one legal advisor, there are no classifications per se for chartered accountants, architects, physicians, and so forth. We see titles of duties or tasks. It is only upon examining job descriptions and the qualifications of incumbents of these positions that we find these professional employees.

Moreover, the same complete list indicates the positions that had been classified TP by the employer, and therefore, those sought by this application. An overview allows us to state, once again, that this is a heterogeneous assemblage of tasks. Thus, in addition to analysts of all types, we find library technicians. Next to myriad positions in "the engineering family," we find records management technicians. Next to all types of administrators, we find security guards. Next to programmers of every description, we find stationary engineers.

The following additional information provided by the applicant is also very revealing of the scope of this application:

"To our knowledge, there is no trade union which is the certified bargaining agent covering any of the employees affected by this application. However, we are fully aware that, further to the Canada Labour Relations Board's decision of July 17, 1979, the Canadian Overseas Telecommunications Union has made claims and representations with a view to including in its bargaining unit some of the employees affected by this application. We strongly oppose all such claims."

(page 19 of this decision)

In fact, this statement was inaccurate. It would have been preferable to say that COTU claimed that additional employees should be included in its unit because its intended scope covered them, and that some of them were now covered by the association's application.

With regard to TTPETC, its application sought in fact to recruit approximately 280 employees classified TP by the employer. Although what we are about to add is incomplete and summary, in order to better identify the intended scope of TTPETC's application, it covered both technicians sought by COTU's application for review, technicians sought by COTU's new application, "professional" employees performing administrative duties, employees defined in section 125(3)(c) of the Code and even employees performing quasi-administrative functions.

Let us recall that in November 1982 this association amended its application and requested that the Board allow this amendment.

Without going into detail, let us say that this was a major amendment since it changed the nature of the original

application. The association had applied for certification to represent the P employees included in the "TP" category established by the employer.

Even if this "amended" application was withdrawn on December 17, 1982, it is interesting to read the following passage of the written submissions filed by counsel for the association, dated December 3, 1982.

"First of all, we insist on repeating to the Board that the Telecommunications, Technical and Professional Employees of Teleglobe Canada (hereinafter referred to as 'TTPETC') is a union in full evolution which, since its creation almost a year ago, under conditions that I have qualified as extremely difficult, sought to include in its future unit, because of their obvious common interests, professionals as well as 'persons performing the functions of a professional but who lack the qualifications required of a professional.' Since we are aware that the Board tends to discourage the establishment of multiple bargaining units within the same company, we have no qualms about recognizing that the purpose of our application was to establish a solid basis on which we could build, and, sooner or later, depending on the way things turned out, regroup together the employees who would form the ideal unit."

(translation; emphasis added)

It had then clearly become an application contemplated by section 125(3) of the Code. The original application excluded professionals within the meaning of the Code. The preamble of section 125(3) reads as follows:

"125.(3) Where a trade union applies under section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, ..."

However the amendment brought about a reversal of section 125(3), and that is what is meant by this part of the argument. Initially, the unit did not have any professionals, but now, through an amendment, the union was seeking to include professionals in the unit. According to

the evidence adduced, there were approximately 100 "pure" - if we can use this expression - professionals in the enterprise. There is no doubt that when the Board, in the interest of natural justice and in order to get other reactions to COTU's claims in its application for review, requested that the notice referred to on pages 17-18 above be, posted, the Teleglobe employees took serious stock of the situation. As a result, this association was formed and an application for certification was filed. This action, in turn, caused a reaction from the other two unions at Teleglobe Canada. The first, COTU, tried to have the scope of its certificate defined, and the other, CWC, filed an application for certification that changed the scope of its certificate. In both cases, the application could include professionals, or at least employees performing the functions of professionals without having the qualifications required of professionals. These developments, in turn, seemed to upset some of the professionals and they took action. This explains the amendment brought by that association.

As we have already pointed out, the reaction of employees other than "pure" professionals and that of some of the professionals was not substantial enough to produce the percentage of memberships required under the Code in the case of the first unit proposed or in the case of what became another proposed unit. In our humble opinion, the phenomenon that occurred at Teleglobe Canada points to the fact that the amendments to the Code in 1972 were an attempt to appeal to all the pressure groups and to please everyone. The result, however, was that these provisions are very difficult to apply.

It is particularly clear from these provisions that Parliament deferred in a major way to the traditional professional associations, including those representing engineers.

Perhaps we should not find this surprising. The history of the last decades shows that salaried professionals have been wavering continually between refusing to opt for collective bargaining or accepting it fully (for example, the engineers in the public and parapublic sectors in Quebec). The other choice was to look for compromise solutions. The legislative draftspersons reflected these waverings, as is illustrated in the wording of section 125(3) and the definition of professional employee in section 107.

The positions adopted by the "professionals" at Teleglobe is part of this pattern. They reacted as a result of the pressure applied by COTU, and the "pure" professionals were the last to react.

After a careful analysis of the file and the other applications, the Board concludes that COTU's application for certification (file no. 555-1707) was filed somewhat defensively, as a result of TTPETC's application. Thus, when the union filed that certification application, it asked that its application for review be given priority. It alleged that the application for certification had the same scope as the application for review.

The union reminded the Board that, at the hearings leading to the decision in Teleglobe Canada, supra, it had maintained that the intended scope of its certification covered a number of employees who, while they were not "pure" professionals, performed similar functions or duties

all or part of the time. To some extent, the union was blaming the Board for having allowed the employer to continue to exclude these employees from its certificate, because of the Board's interpretation of the definition of professional employee. The union referred to the new wording determined by the Board that excluded all professionals within the meaning of the Code.

However, the Board concludes that the application for certification is different from the union's position in its application for review in two respects. The first is doubtless the result of the debates surrounding the application for review. The difference is as follows:

Certificate held

"all employees of Teleglobe Canada, in Canada, assigned to the conception, planning, setting up, operation, and technical maintenance and repair of equipment, with the exception of professional employees as defined by the Code, ..."

Application for certification

"all employees of Teleglobe Canada, in Canada, assigned to the conception, planning, programming and promotion of equipment, services and facilities, and to the setting up, operation and technical maintenance and repair of equipment and facilities."

We would like to emphasize the addition of the words "programming and promotion" and "facilities." We will come back to this point in our conclusions.

As to the other difference, it is substantial. The professional employees are not excluded. However, this difference did not surprise the Board, because from the time the union filed its application for review (file no. 530-682), it had raised the issue of the inclusion of professionals (mainly engineers) in the intended scope of its certification certificate. On October 2, 1981, before the public hearings on the application for review began,

COTU filed additional submissions, with a copy to the employer, which contained the following:

"We would also like to emphasize another problem that is raised by the adoption of a bylaw by the Quebec Executive to admit graduates of the Ecole de Technologie Supérieure of the University of Quebec in Montréal as members of the Professional Corporation of Engineers of Quebec. The Professional Corporation challenged the bylaw, but it is law in Quebec and, at the very least, it would seem that the barrier that existed in the past between technicians or technologists and engineers is becoming less and less significant and therefore it is appropriate to ask whether or not it is necessary to exclude engineers from the unit. ..."

(translation; emphasis added)

Did the applicant, through this application for certification, in fact change its assessment of the intended scope of its bargaining unit?

There is no doubt in the case of the last of the three applications for certification, the one filed by CWC, that it suggests a substantial change in the scope of the original certificate. The original bargaining unit had always included employees performing office duties, traditionally referred to as "office employees" or "white-collar workers."

The union is now proposing the creation of a new grouping, a new unit, which it alleges to be appropriate and is comprised of:

"all employees of Teleglobe Canada, in Canada, assigned to clerical and administrative functions..."

In filing the application, the union is seeking to represent many of the employees in positions covered by TTPETC's original application and its amended application.

This leads us to deal with TTPETC's new application for certification filed on December 17, 1982. At the same time, it asked the Board to note that it was withdrawing its original application and its amendment. The Board never followed up on this application for certification (file no. 555-1843) and did not conduct an investigation.

The Board dismisses the application and closes the file. The reasons follow.

The Code contains specific rules covering the periods during which a union may file an application for certification. The general scheme of the Code seeks to protect vested interests, to facilitate the right of association and to maintain industrial peace for employers during specific periods. Otherwise, there would be chaos. The provisions of section 124 in particular mean that, generally speaking, an employer and the existing union can expect that a collective agreement will remain in effect until its expiry date. In addition, certified unions are protected from raids by rival associations for a specific time and under specific conditions.

The clearest case occurs when there is no union in place. An association may then file an application for certification at any time, but the application must be serious, since it mobilizes both the Board and the employer. Applications cannot be merely fishing expeditions. This Board, like a number of its provincial counterparts, has found abuse that runs counter to the general scheme of the Code with respect to applications for certification. As a result, associations cannot make repeated applications for certification with impunity or take the liberty of amending

the intended scope of their applications by using data from the Board's investigation and information supplied by the employer. For example, an association that wants to know what majority it requires in a proposed unit cannot expect to file an application that will reveal the figure in the course of the Board's investigation of the employer, continue its organizing campaign in the meantime, then withdraw the application and file another, and so forth.

To avoid this type of situation, section 31 of the Board's Regulations provides:

"31. Where the Board has refused an application from a trade union for certification as the bargaining agent for a unit, the Board shall not thereafter receive another application from the trade union for certification in respect of the same or substantially the same unit until a period of six months has elapsed unless the Board, on the application of the trade union, abridges that period pursuant to paragraph 118(m) of the Code."

The Board has already explained its policy in this regard. It does not automatically grant requests to withdraw applications for certification. If its investigation shows that an association has tried to abuse the provisions of the Code, it will apply section 31 of its Regulations.

In the files under consideration, as we have already explained, the two collective agreements expired at the end of December 1981 or very early in 1982. Consequently, TTPETC's original application was timely. The field would have been completely open if the application had not overlapped the scope of the certificate held by COTU, at least in part. The association obtained information as a result of the Board's investigation. Almost one year later, it requested permission to amend its application by changing its intended scope. The Board refused permission to amend

the application until it had conducted a new investigation. After the association received its copy of the report on November 30, 1982, it withdrew its amended application on December 17, without the Board's permission, and filed another application for certification the same day. However, on December 3, it made the argument quoted earlier on page 77:

"... the purpose of our application [the original one] was to establish a solid basis on which we could build, and, sooner or later, depending on the way things turned out, regroup together the employees who would form the ideal unit."

We think this was an abuse of the certification scheme provided by the drafters of the Code. What is the Board supposed to do while it waits to see "the way things turned out"? This approach is intolerable for both the employer and the existing unions.

For this reason, the Board decided not to grant the association's request to withdraw the amended application and decided to dismiss it on the grounds that it did not have the required representative character. The new application for certification (file no. 555-1843) was therefore not in order until the Board dealt with the withdrawal of the amended application.

VII

In order to make a final ruling on the three outstanding applications, we must come back to the issue of professionals. The application for review filed by COTU addresses this matter, as does its application for certification. In addition, CWC is asking that several

professionals be included in its application for certification.

After thorough consideration, the Board considers, not without some hesitation, that section 125(3) and the term "professional" must be interpreted as follows so as to comply with Parliament's will while at the same time facilitating a rational administration of the labour relations matters covered by these provisions.

1. The Board must definitely favour a unit made up of professionals of the same discipline in cases where an application of this type is filed, unless such a unit is not appropriate for collective bargaining for other reasons. The most obvious example would be the case of a unit without the sufficient number of members to make it viable.

The Board did not receive any applications of this type in the files under consideration.

2. The word "eligible" must be interpreted restrictively. The Board considers that all the educational requirements must be met. Otherwise, the individual cannot be engaged in the application of all the specialized knowledge that qualifies him or her to be a professional. It is up to the employees who want to be included in a unit of professionals or who want to be excluded from another unit that is trying to cover them to prove their eligibility within this narrow meaning and in accordance with the qualifications required by a professional organization authorized by statute to define the qualifications for membership in the organization.

Thus, an individual with all the necessary course credits but who for the moment does not have the necessary funds to pay the professional dues is not "eligible." Another individual who complies with the educational criterion but who does not meet the Canadian citizenship requirement would not be "eligible" for a certain period of time.

3. The choice of the words "in the course of his employment" ("dans le cadre de son emploi") seems to imply that it is not necessary for the individuals to spend all of their time engaged in the application of specialized knowledge. However, the Board does consider that the standard must nevertheless be high. We think that most of the employee's time must be spent applying specialized knowledge. The Board is very aware that the evidence to be administered will lead it and the parties into very long and difficult discussions. This was obvious in the hearing held on the application for review (file no. 530-682) at issue. Based on the experience in this case and that in Bell Canada, supra, it might be a good idea in the future for the Board to assign responsibility for most aspects of the evidence to its investigation services. If there were outstanding disputes, it could rule on those cases in public hearings.

Furthermore, the choice of the words "engaged in the application" requires that the very content of the duties be closely and substantially linked to specialized knowledge. The fact that an incumbent performs a task that occasionally involves a specific technique, where it would be merely fortunate to have an incumbent with this specialized knowledge, does not, in our opinion, qualify the individual as a professional within the meaning of the Code.

Here again, the administration of the evidence could be long and difficult.

4. The words "specialized knowledge ordinarily acquired" are particularly ambiguous and difficult to apply in given situations. In our opinion, this is true in the case of Teleglobe. The term used in English is "ordinarily". The term in French is "habituellement." These words leave the door open to exceptions.

According to the Board, there is one main type of exception. We are thinking of individuals, who, because of long years of service performing duties involving the application of specialized knowledge, without having a university diploma, could be considered professionals. This equivalency could be demonstrated more easily when the person is working beside professionals with university degrees who are performing substantially the same duties. In this case, the evidence could become a real nightmare.

Are we talking about the individuals referred to in section 125(3)(c) of the Code? If this is so, and we think it is, the wording of that section seems, in our view, to limit the Board's discretion considerably because of the word "may." We are talking about people who perform all the functions of a professional but who do not have the qualifications of a professional within the meaning of section 107 of the Code. The English reads "performing the functions," and the French reads "exerçant les fonctions." It would have been easier to interpret this wording if section 125(3)(c) had used the same words as those in section 107 "in the course of his employment, is engaged in the application of specialized knowledge." Does "in the course of his employment" mean the same thing as "performing the

functions"? We believe the second expression is more restrictive than the first. As a result, there is an additional restriction placed on the Board in exercising its discretion under section 125(3)(c) to add individuals performing the functions of a professional but who do not have the qualifications required of a professional to a unit requesting certification that is comprised solely of professionals.

Let us now apply these rules to COTU's applications, taking into account all the evidence and the lengthy arguments brought forward by all parties, the main points of which have been mentioned in these reasons for decision.

In the discussions leading to the Board's decision in Teleglobes Canada, supra, and those surrounding the application for review (file no. 530-682), COTU never conceded that professionals performing functions covered by the scope of its certification should be excluded. In all fairness, the Board must add that the union's main concern was not to represent the professionals who met all the requirements of the definition in section 107 of the Code in that they performed functions covered by the scope of its certification. Its main concern was a fairly large group of individuals who, in its opinion, did not meet the requirements of the definition but did perform, side by side with a number of members of its unit, some or all of the functions covered by the scope of its certification.

The Board did not help the situation with its universal description of the bargaining unit in 1977 in Teleglobes Canada, supra, where it stated in the exclusions "with the exception of professional employees as defined in the Code." In its effort to apply the new description of its unit, the

union came up against the employer's interpretation, which excluded many of the individuals in the group of employees that constituted the union's main concern. The employer alleged that a number of the employees were "equivalent" professionals, and thus refused to concede to the union that they were covered by the scope of the certificate.

Since the Board had never specified its policy on the interpretation on the provisions of the Code covering professionals and since it refused to include them in 1977, the employer adopted its own interpretation of the words "professional employees as defined in the Code."

When TTPETC interrupted public hearings on the application for review, COTU filed its own application for certification. However, it continued to insist that the Board rule first on its application for review, and it emphasized that its application for certification had essentially the same scope as that of the already existing unit. And, it did not withdraw its application for review. The application for certification was in fact a defensive measure concerning the group of employees who continued to be the subject of a dispute between the union and the employer and were included by TTPETC in its application for certification. Moreover, COTU dropped from its description of the proposed unit the exclusion determined by the Board "professionals as defined in the Code," which had caused problems.

The Board still believes that the universal approach it adopted in 1979 to redefine the bargaining unit represented by COTU was sound in labour relations terms, in that it took into account the general nature of the functions performed by a homogeneous group of employees in this enterprise while

at the same time respecting its technostructure. The evidence showed that over the years these characteristics have merely become more pronounced. However, it has become obvious to the Board that it must amend its definition of the unit to reflect the conclusions it is forced to draw from its analysis of these files regarding the interpretation of sections 125(3) and 107 (definition of professional).

In 1977, the Board stated that the intended scope of the unit it was redefining was to encompass those employees working in the technical areas of the operation, as opposed to those in administrative and office services. In so doing, it believes it complied with the intended scope of the original certificate awarded in August 1952 by its predecessors (see page 6 above). That original certificate did not restrict members of the unit to employees in operations and engineering services only. There was a list, which referred to the classifications of engineer, technician, craftsman, as well as operators and other classifications. However, the engineers referred to were not the degree-holding engineers who became the subject of a dispute between the parties.

The Board therefore decides to allow in part COTU's application for review (file no. 530-682). The community of interest of all employees working in the technical areas of the enterprise has increased since 1979 because of the introduction of new technologies and operational methods that forced all technicians and technical employees to perform duties that increasingly overlapped their respective disciplines. All these employees, those classified TP by the employer, as well as those classified CT, are given more and more opportunities and encouragement to add to their

specialized knowledge of the techniques used in the operation of the enterprise. The evidence amply demonstrated that all these employees have an opportunity to increase constantly their theoretical knowledge and they do so.

However, the Board intends to comply with Parliament's will to give preference to the creation of separate units for professionals. Pursuant to its discretion under sections 125(1) and (2) of the Code, the Board rules that those professionals who work in technical areas of the enterprise, in all its services, shall be excluded from the unit:

1. if, in the performance of their duties, they spend a preponderant portion of their time applying the specialized knowledge of a technique learned in the course of studies leading to a university diploma, and
2. if they are members of a professional organization authorized by law to define the qualifications required of its members, or individuals eligible to become members, but within the restricted meaning given by the Board to the word "eligible" earlier in these reasons for decision.

This exclusion of professionals will be an integral part of the interpretation to be given to the new wording of the certification certificate awarded to COTU.

In addition, the Board rejects the distinction introduced and applied by the employer that it has asked the Board to sanction with respect to off-line and on-line equipment. Everything depends on whether or not the equipment is

associated with the technical aspect of the operation of the enterprise. That is the test.

With the exception of professionals, within the narrow meaning we have just defined, all other employees assigned to technical duties related to or associated with the operation of the enterprise as opposed to the administrative or office duties will be included in COTU's bargaining unit. The amended wording of the certificate, which does not change its intended scope but rather clarifies it, at least that is our hope, will be as follows:

"all employees of Teleglobe Canada in Canada in all technical services of the telecommunication operations of the enterprise and without restricting the generality of the foregoing description, all employees assigned to the conception and planning of equipment, to technical services and installation as well as to the setting up, operation, technical maintenance and repair of the equipment and installations but excluding professional employees, persons who perform administrative or office functions, persons who perform management functions, persons employed in a confidential capacity related to industrial relations and employees covered by other Certification Orders issued by the Canada Labour Relations Board, but including all employees of the employer assigned to cleaning and building maintenance functions."

Because of the Board's decision regarding COTU's application for review, it becomes unnecessary to rule on the same union's application for certification. Consequently, file no. 555-1707 is closed.

We must still deal with CWC's application for certification (file no. 555-1713). This may be the most difficult case as regards the question of appropriateness. Since its establishment within the enterprise, this union has confined its activities to the group of office employees and has represented their interests through collective bargaining

and defended their grievances regarding the application of their collective agreements.

The union has certainly witnessed the arrival and implementation of new technologies used increasingly by management to introduce more advanced management and administration methods. This relatively recent phenomenon in all enterprises has doubtless been introduced faster in Teleglobe Canada because of the very nature of its operation, namely, telecommunications. The union no doubt noticed that new equipment was being used and that its members had to become familiar with some of it and sometimes learn how to operate it. It also noted that many new positions were created as a result of the introduction of these management and administration methods, and some of its members were required to provide the necessary office support services.

It is clear that a few years ago the union did not represent operators of word processors and editing machines, computerized pay system clerks, assistants to financial analysts, assistants to telecommunications representatives, terminal clerks, forms designers working with forms analysts, printing press clerks, binding clerks, typesetting machine clerks, forms management clerks, assistants to word processing service analysts, researchers, microphotography clerks, purchasers and expeditors in purchasing, assistants to public relations officers, audio-visual equipment clerks, terminology or translation editing machines clerks, assistants to data bank administrators, data entry operators, keypunch operators, computerized data librarians and computer operators (in the M.I.S.), technical clerks, telex clerks, and so forth. The Board has just listed a

whole series of classifications in which the new duties result from the phenomenon explained above.

The Board has difficulty understanding that the union did not realize quickly that the employer was putting the emphasis on new technologies and new management methods, and was consequently hiring many knowledge workers. This is particularly surprising given that the new TP category highlighted this fact. We reported above in these reasons that the same evaluation criteria were generally used by the employer in the TP and OU categories. However, the weight of some criteria was much greater in the case of TP positions than in the case of their equivalents in the OU category. The criteria stressed educational classifications, specialization, research, consultation and judgement. Although the evidence showed that the methods used to determine whether or not to include a new position in the TP category were open to question, the fact remains that the employer ensured it had the services of many employees of a new type, a number of whom had acquired specialized knowledge through courses taken in institutions of learning. Several employees belong to new professions, as opposed to the traditional professions of engineer, architect or lawyer.

A relatively high percentage of these new employees were assigned to duties created to assist management in providing a more effective and contemporary type of management and administration.

As a result, the Board wondered why the union had not long ago applied to represent a new bargaining unit comprised of the office and administrative support employees. The Board can only conclude that the main reason the union filed the

application at this time was the sudden filing of an application by TTPETC.

It should be noted that CWC's application seeks to include professionals in the broader sense of the term, that is, without making any distinction between those who use specialized knowledge in the performance of their duties and those who do not, those with degrees from universities or similar institutions, and those without, and those who are eligible and those who are not.

During the public hearings, that union conceded to a number of exclusions, but they were almost all justified because the employees in question were performing management functions or employed in a confidential capacity in matters related to industrial relations. As counsel for the employer emphasized, the applications for certification filed by COTU and CWC covered all non-unionized (and unionizable) employees, such that there would be three bargaining units left and represented by TTSA, COTU and CWC.

Given the way things turned out in these files, the employer was led to argue, without stating or admitting the fact directly, that it preferred four or five bargaining units to the three that would result from the units proposed by COTU and CWC.

Certification certificates for administration employees only are very rare in the Board's jurisdiction. Certificates combining employees who perform office duties with employees who perform administrative duties are equally rare. Clearly, the problem stems from what is meant by administrative duties. In this case, the employer itself contributed to this state of affairs.

As we indicated above, there are a number of positions in the proposed unit that the employer itself classified as "assistant." This is true of a number of its services. The employer put these positions in the ST category, and therefore in the wage scale it negotiates with CWC.

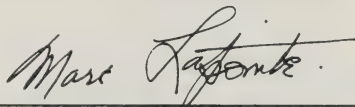
The Board is not prepared, at least not for the moment, to sanction the bargaining unit proposed by CWC. However, the Board believes it is in the interest of the parties to grant the proposed unit in part and it will therefore issue a new certification order to CWC that will read as follows:

"all employees of Teleglobe Canada in Canada, working in all of its services, performing office support functions and without restricting the generality of the foregoing, all employees providing office support services according to conventional means or according to methods and technical equipment which are the result of new technology and those exercising administrative functions associated with those office support services, excluding professional employees, employees performing management functions, those employed in a confidential capacity in matters relating to industrial relations and employees covered by other Certification Orders issued by the Canada Labour Relations Board."

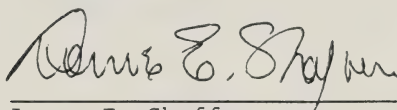
This decision by the Board, together with the one already made regarding the COTU unit, therefore leaves a group of employees who are not covered by any certification order. They are professionals within the strict meaning of the term as explained in these reasons and a group of employees involved in administrative duties (knowledge workers), who use all sorts of technical knowledge in the performance of their respective duties. Some in each group have expressed a wish to opt for collective bargaining.

The Board hereby declares that, in accordance with the provisions of the Code and its Regulations, all bargaining

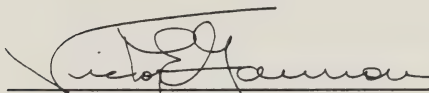
agents are free to file one or more certification applications regarding these groups. However, all will obviously have to take into account the comments and interpretations contained in these reasons for decision.



Marc Lapointe, Q.C.
Chairman



Lorne E. Shaffer
Member of the Board



Victor E. Gannon
Member of the Board

ISSUED at Ottawa, this 22nd day of December 1988.

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Summary

THE SYNDICAT DES EMPLOYES DE BUREAU
DE VOYAGEUR INC. (CNTU), COMPLAINANT
AND VOYAGEUR INC., RESPONDENT.

Board File: 745-2925
Decision No.: 732

Résumé de Décision

LE SYNDICAT DES EMPLOYES DE BUREAU
DE VOYAGEUR INC. (CSN), PLAIGNANT ET
VOYAGEUR INC., INTIME.

Dossier du Conseil: 745-2925
No de Décision: 732

On June 1st, 1988, the Minister of Labour, pursuant to section 97(3) of Canada Labour Code (Part I), consented to the Syndicat des employés de bureau de Voyageur Inc. (CNTU) filing with the Board a complaint alleging violation of section 50(a) of the Code by Voyageur Inc. After notice to bargain collectively had been given by the complainant, Voyageur Inc. had stopped bargaining in good faith and making every reasonable effort to enter into a collective agreement.

In summary, the complaint blames Voyageur for the following:

- its refusal to provide financial statements;
- its attitude on important bargaining issues, i.e.
 - technological changes,
 - unjustification of its position,
 - elimination of 20 positions;
- its direct communications with employees;
- the dismissal of employees deemed to be unlawful; and
- the hiring of substitute employees in the circumstances of this case.

The Board upholds a part of the complaint and orders Voyageur to cease contravening section 50(a) of the Code and to comply with it.

Le 1er juin 1988, le ministre du Travail, conformément au paragraphe 97(3) du Code canadien du travail (Partie I), consentait que le Syndicat des employés de bureau de Voyageur Inc. (CSN) dépose auprès du Conseil une plainte alléguant que Voyageur Inc. avait enfreint l'alinéa 50a) du Code. Une fois l'avis de négociation collective donné par le plaignant, l'intimé avait cessé de négocier collectivement de bonne foi et de faire tout effort raisonnable pour conclure une convention collective.

En résumé, la plainte reproche ce qui suit à Voyageur:

- son refus de fournir les états financiers;
- son attitude sur les grands enjeux de la négociation, p. ex.
 - changements technologiques,
 - non-justification de sa position,
 - élimination de 20 postes;
- ses contacts directs avec les employés;
- le licenciement déjà jugé illégal des employés; et
- l'embauche d'employés de remplacement dans les circonstances de ce dossier.

Le Conseil accueille cette plainte en partie et ordonne à Voyageur Inc. de cesser de contrevenir à l'alinéa 50a) du Code et de s'y conformer.

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Reasons for decision

The Syndicat des employés de bureau
de Voyageur Inc. (CNTU),

complainant,

and

Voyageur Inc.,

respondent.

Board File: 745-2925

The Board was composed of Mr. Marc Lapointe, Q.C., Chairman,
Mr. Serge Brault, Vice-Chairman, and Mr. J. Jacques Alary,
Members.

Appearances:

Mr. Clément Groleau, for the complainant; and
Messrs. Casper Bloom, Q.C., and John Coleman, for the
employer.

These reasons for decision were written by Mr. J. Jacques
Alary, Member.

I

On April 11, 1988, the Syndicat des employés de bureau de
Voyageur Inc. (CNTU) (the union) sought the consent of the
Minister of Labour, the Honourable Pierre H. Cadieux, to
file a complaint under sections 50 and 97 of the Canada
Labour Code (Part I - Industrial Relations) (formerly
sections 148 and 187, Part V) against Voyageur Inc.
(Voyageur or the employer).

On April 18, 1988, counsel for the complainant sent the
Board a copy of this complaint and a copy of the letter to
the Minister of Labour.

The union is requesting that the Board:

"(A) DECLARE that Voyageur Inc. contravened section 148(a)(i) by failing to bargain in good faith;

(B) DECLARE that Voyageur Inc. contravened section 148(a)(ii) by not making every reasonable effort to enter into a collective agreement;

(C) ORDER Voyageur Inc. to withdraw its demands concerning reorganization and technological changes as well as all those affecting the organization of work, for a period of six months effective the date of the order;

(D) DECLARE that, during this six-month period, the provisions of the collective agreement that expired on December 31, 1986 will continue to be in effect;

(E) ORDER Voyageur Inc., within two months of the Board's order, to submit to the union, in the course of bargaining for the collective agreement, a new proposal accompanied by all the relevant documents and to provide it with all details of studies and information required in order to evaluate and understand this proposal;

(F) ORDER Voyageur Inc. to terminate the lockout and reinstate all employees affected by the lockout in their employment;

(G) ORDER Voyageur Inc. to restore to each and every employee who is a member of the bargaining unit represented by the union all pay and other benefits denied them since the lockout began;

(H) ORDER Voyageur Inc. to reimburse the union the dues it has been denied since the lockout began;

(I) COMPENSATE the union for all other expenses or damages owed and caused by Voyageur Inc.;

(J) ISSUE any other order to repair the damage done to the union and to each and every employee it represents, and to the organizations with which it is lawfully affiliated."

(translation)

On June 1, 1988, the Minister of Labour, acting pursuant to section 97(3) of the Code, consented to the union's filing with the Board its complaint alleging that Voyageur contravened section 50(a) of the Code in that, following receipt of notice to bargain collectively, Voyageur failed to bargain collectively in good faith and to make every reasonable effort to enter into a collective agreement.

The complaint was heard at a public hearing beginning on July 7, 1988. This hearing covered several days and ended on August 26, 1988.

II

The union was certified on May 5, 1987 to represent:

"all office employees of Voyageur Inc. working at 505 de Maisonneuve Boulevard East and 1380 - 90 William Street in Montréal, excluding executive secretaries, personnel officers, file processing officers, sales staff having authority to bind the employer to third parties, employees covered by other certification orders in the Metropolitan region of Montréal, supervisors, and those above the rank of supervisors."

The unit is comprised of some 56 employees.

The employer is a duly constituted company having its headquarters at 505 de Maisonneuve Boulevard East, Montréal, Quebec, and specializing in motor coach transportation. Its employees belong to several bargaining units. The principal unit, comprising the drivers, is represented by the Teamsters, while the other four, consisting of maintenance and office personnel and the employees of the Montréal and Québec terminals, are represented by unions affiliated with CNTU. Moreover, Voyageur has a sister company known as Voyageur Colonial Ltd. (Colonial) located in Ottawa. The office employees of Colonial are not unionized.

Approximately one year before negotiations began, the senior officers of the company informed all employees in the various bargaining units that Voyageur was facing a dilemma: either rationalize operations or, quite simply, sell the business. The testimony given by Mr. Hair, Vice-President, Finance, and Mr. Holmes, Vice-President, Human Resources, on this subject was convincing. Moreover, in the Fall of

1986, during negotiations with the drivers represented by Teamsters Local 106, the employer sought, inter alia, to reduce the pay provisions by some 20%. A strike ensued and a settlement was reached in January 1987. Immediately thereafter, a letter was sent to all the other unionized employees of Voyageur informing them of this settlement. It can be said that, from that moment, the union could expect hard and difficult bargaining.

The collective agreement binding the employer and the union expired on December 31, 1986.

In March 1987, the union gave the employer notice to bargain. The parties do not appear to agree on the date of the notice, but do agree that it was given.

The union submitted its proposal for a new collective agreement on April 1, 1987, and explained, as is customary, its various demands.

It was at the second session, on May 4, 1987, that positions began to harden. The employer, instead of replying to the demands contained in the union's proposals, submitted its own demands. The mandate of the employer's negotiating committee seemed clear: major and significant changes had to be considered in order to reduce costs and rationalize operations, while improving productivity. Certain functions, particularly in Ottawa, had to be computerized and centralized and certain services relocated. To this end, the employer was seeking, through its demands, greater flexibility in the collective agreement in the areas of seniority, contract work, job security, the workweek and overtime. It was seeking more particularly to cut a considerable number of positions.

In support of its position, the employer cited increased competition from other forms of transportation, a loss of the company's viability and a significant decline in the number of passengers resulting from changes in the habits of people, many of whom were choosing to use their own private vehicles to travel.

On the issue of cutbacks, both at the time the complaint was filed and throughout the negotiations, the employer was never able to specify the positions and persons who would be affected by its demands. Initially, the figure of 20 positions was mentioned, but as the negotiations proceeded and employees left voluntarily, the number of persons affected decreased, but the number of positions to be abolished did not.

The employer claimed that it could not provide the union negotiators with more information on this subject because, it said, it was in the process of computerizing its various office services and the number of positions would not be finalized until this process was completed.

The union found these employer demands unacceptable and wanted more information before making concessions.

At one point, the union asked to see the employer's financial statements, but when it met with an initial refusal, it did not press the matter. Testimony revealed that the union twice asked to see the books, but did not really insist. On this question, Mr. Lachance, union negotiator, told the Board that he agreed with the employer's position that seeing the books was not likely to resolve an impasse at the bargaining table. Thus, after he met with an initial refusal, he did not subsequently press the matter. Moreover, Mr. Lachance and Mr. Grenier, the Local president,

told the Board that, in their opinion, the employer was using the company's alleged financial difficulties to win concessions from all the employees of Voyageur.

The evidence reveals that the longer the parties negotiated, the worse relations between them became. Statements were made to the media and demonstrations were held. The employer replied with injunctions. The dispute was eventually carried on in public and before the courts. Several negotiation meetings were held, but the same issues were rehashed and the same proposals rewritten without either side changing its position. The parties met, in this atmosphere, on April 1, 1987, May 4 and 20, 1987, June 3, 4 and 25, 1987, July 29, 1987, September 16, 1987, October 1, 1987, January 27, 1988, February 8, 1988, May 25, 1988, and even a few times after the present complaint was filed.

Realizing that direct negotiations had resulted in an impasse, the parties, in the course of bargaining, requested the help of a conciliation officer. On August 14, 1987, the Minister of Labour, acting pursuant to section 72(1)(a) of the Code, appointed a conciliation officer, Mr. A. Drouin. Meetings were held with him on September 17 and 18 and October 15 and 16, 1987.

On November 23, 1987, Mr. Michael McDermott, Director General, Mediation and Conciliation, informed the parties that, after receiving the report of the conciliation officer, the Minister of Labour had decided, under his discretionary authority, not to appoint a conciliation commissioner or establish a conciliation board, pursuant to section 74(c) of the Code. This action was of course significant.

On December 7, 1987, Voyageur decided to exercise its right to declare a lockout, beginning at 4:45 p.m. that same day. The parties had not met since October 16, 1987. Not until January 27, 1988 did the employer convene a meeting with the union, indicating that it was convinced that common ground could be found. At this meeting, Voyageur informed the union that if the parties did not reach an agreement by February 10, 1988, the employment of all financial services employees would be terminated - in other words, the vast majority of the members of the bargaining unit.

On January 27, the employer also sent each employee a letter (Exhibit S-5) with two attachments. The first attachment was addressed to the financial services employees and constituted a notice of termination of employment that was to take effect on February 10, 1988. In this notice of termination of employment, Voyageur informed the employees affected that the services where they worked were being transferred to Ottawa, to Colonial. The other attachment, addressed to the remainder of the employees in the bargaining unit, informed them that they would continue to be locked out. At the request of Mr. Drouin, who was subsequently appointed special mediator by the Minister of Labour, the employer postponed the terminations until February 11, 1988. This eleventh-hour mediation proved fruitless and Voyageur proceeded to terminate formally the employment of the financial services employees and continued to lock out the other employees in the bargaining unit.

On February 9, 1988, in response to the terminations, CNTU asked the Board to declare, pursuant to section 44 of the Code, that Voyageur's financial services had been transferred to Colonial and that this transfer constituted a sale of business within the meaning of said section 44 (file 585-227).

That same day, 33 complaints of unfair labour practice, alleging that Voyageur had contravened section 94 of the Code, were filed with the Board (file 745-2849). A 34th complaint was filed on March 14, 1988. The 34 complainants, all members of the bargaining unit comprising Voyageur's clerks, alleged that their employment had been "terminated on February 10, 1988 in contravention of section 94 of the Canada Labour Code."

The section 44 application and the above-mentioned complaints were dealt with at a Board hearing in Montréal on March 16, 1988. The case was heard by a different Board panel from the one hearing the present case. On the eve of that hearing, Voyageur put on hold its plan to transfer the financial services to Ottawa and cancelled the terminations, citing new circumstances which, in its opinion, no longer justified the move. These circumstances, argued Voyageur, were the impending expiry of the collective agreements of three other CNTU units, and bargaining already under way with Colonial's drivers, bargaining that was also expected to be difficult.

Although the employer asked that panel of the Board to consider the complaints null and void, the Board nevertheless heard the case and concluded, first, that there was no sale of business and, second, that Voyageur was guilty of unfair labour practices.

On March 29, following the Board's decision that allowed the complaints of the terminated employees, the employer reinstated them as locked out employees.

In the light of the evidence it heard at that public hearing concerning the complaints and the sale of business, and in

particular during the testimony of Mr. Holmes, the union was convinced that the relocation in Ottawa announced by Voyageur was merely a "bluff" and that Voyageur had used this threat to force the union to accept the employer's proposals at the bargaining table. In the union's opinion, this constituted bad faith bargaining. The union therefore sought the Minister's consent to file with the Board the present complaint alleging bad faith bargaining.

III

In the present case, the Board heard conflicting testimony concerning this relocation.

According to testimony given to the Board by Mrs. Couillard, and according to the text of the decision in Voyageur Inc. (1988), as yet unreported CLRB decision no. 685, which was the subject of an application for review in the Federal Court of Appeal that was withdrawn on January 23, 1989 (see Voyageur Inc. v. Diane Gosselin et al., file no. A-609-88, January 23, 1989 (F.C.A.)); (see in this regard William E. Blonski (1984), 56 di 222; 8 CLRBR (NS) 111; and 84 CLLC 16,054 (CLRB no. 476), and Iberia Airlines of Spain (1988), as yet unreported CLRB decision no. 687), in March 1988, Mr. Holmes testified before the Board that no one at Voyageur had been given a mandate to proceed with the relocation. In testimony before this panel, he denied this statement and indicated that he was asked very few questions at the first public hearing and that he was not given time to explain himself fully on this question. He simply stated that the proposed relocation was, on the contrary, at a relatively advanced stage.

The employer even filed with the Board plans and specifications, and Mr. Hair testified that he had authorized

persons to look for premises and had called for tenders for equipment.

One wonders whether, at that time, Voyageur was merely interested in successfully defending itself against the sale of business application.

IV

On May 25, 1988, the parties met, without the presence of a third party, to discuss position cuts. By that date, it will be recalled, the union had already announced its intention to file the present complaint. There was talk at Voyageur of terminating 13, and not 20, employees because some employees had left the company since negotiations began. It was explained that the pay service would remain in Montréal and that the accounts payable and receivable service would be transferred to Ottawa. Fruitless discussions ensued and the parties went their separate ways.

During all this time, Voyageur continued to operate its office services with the help of agency personnel, its own management personnel and new employees. It even began to implement new computer systems.

In effect, the parties are engaged in trench warfare, and one doubts that the search for a negotiated settlement is their first priority.

V

The union alleges, inter alia, that Voyageur:

1. did not provide it with the financial statements;

2. was never able to justify its position with respect to position cuts;
3. showed inflexibility despite the concessions that the union made by finally agreeing to the status quo on a number of issues;
4. never submitted a concrete plan for implementing its reorganization proposal and never specified the positions affected.

The union further alleges that Voyageur unlawfully made direct contact with the employees it represents. The employer hired personnel from security agencies to replace locked out employees. Voyageur terminated the employment of a group of employees in order to force them to accept its offers under the guise of a relocation in Ottawa, which it claimed to know nothing about when it appeared before the Board in March 1988. These are essentially the union's allegations.

The employer, for its part, pointed out to the Board that hard bargaining is not bad faith bargaining and that the negotiations must be viewed as a whole. In Voyageur's opinion, the onus of proof was on the union and, in the present case, there is no evidence to support the allegations of bad faith bargaining.

The employer said that it had no choice and that it had to reduce its costs and invest in its fleet. Rationalizing operations in the company was not a new phenomenon: it had started in the Abitibi division. A settlement, incorporating major concessions, had been reached with the Teamsters at Voyageur and with Colonial's drivers.

As for the financial services group, the employer stated that it had not gone as far with its original reorganization proposal as it could have done initially. It made no sense to duplicate services and Voyageur therefore had no choice but to rationalize its operations. To this end, it had to liberalize the seniority and contract work clauses. The company needed flexibility in the agreement. It had to cut staff in two locations, Montréal and Ottawa. Voyageur denied hiding anything and claimed that, as the situation evolved, it kept the union negotiators informed.

According to Voyageur, the union spokesman was not the easiest person to get along with and he did not want to listen to Voyageur's arguments. The message, however, was clear and the concessions made by the Teamsters attested to this fact.

The union refused to settle the issue at a meeting held on May 5 or 6; it chose pressure tactics over discussions. In the wake of the union's refusal to agree to concessions, Voyageur had to act. It stated that it gave the union guarantees: no more than 20 positions. Its position changed, but the union would not accept any retreat.

Voyageur decided to exercise its rights to declare a lockout rather than wait for the employees to exercise their right to strike. The company did not contravene the Code by hiring employees to replace the locked out employees. The deadline of February 10 was an invitation to reflect and agree to the principle of staff cutbacks.

In February, the employer tried to meet with Mr. Marcel Pénin, former CNTU president, to ask him to intercede with CNTU officers and find a solution to the dispute. This initiative failed. The company did not want to hide from

the union its intention to make major changes and this was the reason why it wanted to negotiate the "technological change" and contract work clauses. Voyageur argued that it was flexible on the decision to relocate.

In March, the union no longer wanted a settlement covering the white-collar workers because it preferred a settlement covering all four CNTU units. Voyageur had to put its proposed relocation on hold; otherwise negotiations with the other three groups represented by CNTU would likely end in a deadlock.

Voyageur went on to argue that Mr. Lachance himself stated during negotiations that the case of the office employees could be settled in half an hour, but that in May "the time was not right." It was the union, and not the employer, that failed to bargain in good faith. Voyageur always wanted a collective agreement and it was the union that refused to listen. In conclusion, the union failed to prove that Voyageur had bargained in bad faith.

This is the employer's reply to the allegations made against it.

VI

The allegations made against Voyageur in the complaint can be summarized as follows:

- its refusal to provide financial statements;
- its attitude to the major issues on the bargaining table:
 - technological change

- refusal to explain its position
- elimination of 20 positions;
- its direct contacts with the employees;
- the termination, already determined to be unlawful, of the employees' employment;
- the hiring of replacement employees in the circumstances of this case.

Section 50(a) of the Code reads as follows:

"50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; ..."

(emphasis added)

A number of past Board decisions have dealt with section 50.

In CKLW Radio Broadcasting Limited (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101), the Board examined the origin of the duty to bargain in good faith:

"The duty to bargain in good faith and make every reasonable effort to conclude a collective agreement is not a recent innovation in collective bargaining legislation. It arose originally in the United States as a necessary complement to the establishment of a bargaining relationship. (See Smith, 'The Evolution of the "Duty to Bargain" Concept in American Law' (1941), 39 Michigan L.R. 1065. For its Canadian roots see Palmer, 'The Myth of "Good Faith" In Collective Bargaining' (1966), 4 Alta. L.R. 409). Since the inception of the concept of good faith bargaining and its companion 'reasonable efforts' there has been vigorous debate about the scope of the meaning of

these concepts. That debate has been cast in general terms, beginning with an effort to analyse the policy objectives that should govern the scope of interpretation of these concepts. But even on this launching point the commentators disagree (e.g. Cox, 'The Duty To Bargain In Good Faith' (1958), 71 Harvard Law Review 1401; O'Neill, 'The Good Faith Requirement In Collective Bargaining' (1960), 21 Montana Law Review 202; Maxwell, 'The Duty To Bargain In Good Faith, Boulwarism, And A Proposal - The Ascendance Of The Rule Of Reasonableness' (1967), 71 Dickson L.R. 531; and Findling and Colby 'Regulation Of Collective Bargaining By The National Labor Relations Board - Another View' (1951), 51 Columbia L.R. 170).

The focal point for the debate is differences of opinion over the extent to which the character of collective bargaining is to be regulated. One view is that once collective bargaining commences it is a no-holds-barred exercise. The opposite view is that the object of collective bargaining is a collective agreement and all bargaining parties should be required to act reasonably. Among the proponents of either position there is no consensus on how rough the parties may play or what constitutes reasonable actions."

(pages 53-54; and 693)

Later in that decision, the Board indicated that it would adopt a "non-interference" approach:

"... The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion. At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues."

(pages 58-59; and 696)

Having said this, the Board wishes to make clear that it will ensure that one party does not take advantage of the other at the bargaining table through the use of unlawful tactics.

In CKLW Radio Broadcasting Limited, supra, the Board quoted and endorsed the following excerpt from the decision rendered in Canadian Industries Limited, [1976] OLRB Rep. May 199; [1976] 2 Can LRBR 8; and 76 CLLC 16,014:

"The duty to bargain in good faith is set out in the following terms: '... [T]hey [the parties] shall bargain in good faith and make every reasonable effort to make a collective agreement'. It is not necessary to enter into a full elaboration of the content of this duty. This task has already been undertaken by the Board in De Vilbiss (Canada) Ltd. [[1976] 2 Canadian L.R.B.R. 101]. In that decision, the Board made it clear that satisfaction of the duty to bargain in good faith depends on the manner in which negotiations are conducted, and not upon the content of the proposals brought to the bargaining table. To take the latter approach would mean that the Board would be put in the position of an interest arbitrator, having to assess the relative merits of the bargaining proposals of both parties. It is reasonable to assume, therefore, that the legislature did not intend that the obligation to bargain in good faith should be defined by the content of bargaining.

Good faith bargaining is then left to be defined in terms of the manner in which collective negotiations should be conducted. The approach taken by the parties, as evidenced by their conduct, becomes important, two factors being of particular significance - one is recognition, the other is the quality of discussion. As was stated in De Vilbiss (Canada) Ltd., supra,

'The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.'

Recognition requires each party to approach collective bargaining with the objective of entering into a collective agreement. This means that a failure to reach a collective agreement cannot be motivated by an unwillingness to recognize the other party. The requirement to recognize the other party does not mean, however, that a party can establish a failure to bargain in good faith by simply providing that its terms were not accepted by the other party. This type of proof, going to content of the proposals rather than to the conduct of the negotiations, would be insufficient to establish a lack of recognition.

The conduct of the negotiations is not only judged in terms of mutual recognition but also in terms of quality of discussion. This latter factor is somewhat broader in its application, extending to those situations where there may be present the common objective of entering into collective agreement, but where there is absent any

willingness to discuss how that common objective might be reached. Reference to this aspect of the duty was made by Roach, J.A., in Regina ex rel Hodges v. Dominion Glass Co. Ltd., [1964] 2 O.R. 239 at p. 247:

'There may be some subtle distinction between bargaining in good faith and making every reasonable effort to make a collective agreement but it is so tenuous and elusive as to lose any legal significance.

By s. 12 of the Labour Relations Act the Legislature has stated comprehensively the duty imposed on management and labour alike with regard to collective bargaining and by s. 69 it has imposed a liability for the breach of that duty. The information simply charges a breach of that duty: it does not charge two offences. That duty contains two ingredients that are so inseparable and so blended as to lose their separate identities, the one to bargain in good faith and the other to make every reasonable effort to make a collective agreement. Good faith is demonstrated by an honest and reasonable effort to make a collective agreement so that where the one exists so also does the other. This relationship between the two was thus expressed in National Labor Relations Board v. George P. Pilling & Son Co. (1941), 119 F. (2d) 32 at p. 37:

"Bargaining presupposes negotiations between parties carried on in good faith. The fair dealing which the service of good faith calls for must be exhibited by the parties in their approach and attitude to the negotiations as well as in their specific treatment of the particular subjects or items for negotiation. For such purpose, there must be common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason."

Having regard to the manifest purpose of s. 12 of the Act there is no room for hair-line distinction between bargaining in good faith and making every reasonable effort to make a collective agreement. For all practical purposes the one may be said to be contained in the other.'

The requirement of rational discussion imposes upon the parties a duty to communicate with each other, recognizing that proper collective bargaining depends upon effective communication. Although a failure to communicate might not appear to be the same kind of wrong as an unwillingness to recognize the other party, it does, in fact, have a very serious effect on the collective bargaining process as a whole. The breakdown of established bargaining relationships, because of an unwillingness to engage in full discussion with the other parties, is likely to lead to more frequent resort to economic sanctions, and to greater dissatisfaction with the collective bargaining process. The obligation to bargain in good faith recognizes the importance of collective bargaining as a structure within which a full

dialogue can be conducted between a trade union and the employer."

(pages 202-204; 12-13; and 447-448; excerpt reproduced in CKLW Radio Broadcasting Limited, supra, pages 85-86; and 711-712; emphasis added)

The following principles were also endorsed by the Board in CKLW Radio Broadcasting Limited, supra:

"... This does not mean parties cannot, in the exercise of free collective bargaining, engage in hard or ruthless bargaining.

...

... There is no rule in collective bargaining, like chess, that either party must move first. ...

...

. . . The duty to bargain does not cease when a work stoppage commences, although actions of the parties must be appraised in that climate. ... In the absence of an indication of a change in positions, a refusal to meet was not contrary to the Code."

(pages 87-89; and 712-713)

In Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574), the Board dealt at length with unlawful proposals made by an employer.

Thus, Brewster's offer of a rate of pay for overtime work that was contrary to section 32 of Part III of the Code was determined to be a breach of the duty to bargain in good faith. Moreover, Brewster's demand, pushed to an impasse, to exclude from the bargaining unit a position that was included was found to be unlawful:

"That is not to say that parties may not raise the issue of the scope of the certification order at the bargaining table. It does mean very clearly, however, as has been held on numerous occasions by this Board and by others, that that issue may not be pushed to an impasse; that where a party determines that it has no desire to bargain the scope of the collective agreement, whether it be the employer or the union, then the certification order issued by this Board is the one that will stand, without any limitations, between the parties.

...

'Certainly, and whether such agreements between the employer and the bargaining agent are valid or not, an employer may not lawfully compel or seek to compel the bargaining agent to conclude a collective agreement which is expressly made applicable to a group which is smaller than the unit that the trade union has been certified to represent as bargaining agent pursuant to a certification order issued by the Board. As the Board has already indicated [*Cyprus Anvil Mining Corporation* (1976), 15 di 194; [1976] 2 Can LRBR 360; and 76 CLLC 16,045 (CLRB no. 69), pages 210; 373; and 653], a party may be in breach of its duty to bargain collectively in good faith under the provisions of section 148(a) of the Code if it seeks to compel the other party to include in a collective agreement a provision which is illegal or otherwise contrary to public policy. ...'

(*British Columbia Telephone Company* (1977), 22 di 507; [1977] 2 Can LRBR 404; and 77 CLLC 16,108 (CLRB no. 99), pages 523; 417-418; and 667)"

(pages 44-46; 383-385; and 14,388-14,389; emphasis added)

In the same decision, the Board refers to direct communications with the employees and concludes as follows:

"In determining whether an employer is communicating legitimately with its employees, the Board must look at the nature, object and circumstances of the communication. In our view, the object of such communication must be to inform employees of a particular position or stance. There must not be any overt or obvious elements within the communication, whether the nature of that communication be in writing or orally, that are designed to circumvent the collective bargaining process with the certified or recognized bargaining agent.

Finally, notwithstanding that the object and nature of the communication might at first blush be reasonable, they can be rendered unlawful if the circumstances surrounding the communication result in conveying a meaning or a message to the employees that undermines the union and/or the collective bargaining process.

...

The nature of the communication was unique. It was an employer meeting to which a select few were invited. The type of meeting itself, a dinner with Brewster buying and supplying the locale, food and drink, was designed to encourage a certain loyalty to the employer. The persons representing the employer at the meeting were Mr. Morrison, one of its bargainers, and Mr. Sandford, whose role during collective bargaining was uncertain, with the latter acting as Brewster's spokesman during the meeting. The meeting ended up as a bargaining session with those present. During the meeting, the employer indicated its willingness to establish a new

position outside the scope of the union and terms and conditions of employment superior to those that Brewster was then offering to the union. Lastly, while maintaining that it had no black-list, Mr. Morrison indicated that the employer would be the sole judge of which employees would be taken back if they applied.

The circumstances surrounding the meeting underline the unlawful nature of the communication. The union strike and boycott was ineffectual; Brewster was operating. No progress was being made at the bargaining table. No end of the strike could be seen. Employee morale was low. The mechanics, a not unimportant group of strikers, had just gone back to work. In the midst of this comes the employer with an offer to return to work -- with improved terms and conditions of employment.

It defies credibility to suggest that the meeting had no negative impact on the remaining strikers, the union, and their ability to put meaningful economic pressure on the employer. Only one conclusion is possible: the meeting was designed to further undermine employee morale, bargain directly with employees and destroy the role of the bargaining agent. As well as being an element in the pattern of bad faith bargaining in which the employer had embarked, the meeting violated numerous other provisions of the Code which will be reviewed later in these reasons."

(pages 51-53; 390-392; and 14,392-14,393; emphasis added)

The Board felt that it was unlawful to offer employees hired during a strike better terms and conditions of employment than those offered to the bargaining agent, thereby bypassing the union. Thus, in Brewster Transport Company Limited, supra, the Board added the following:

"In dealing with the July 7 meeting first, it is abundantly clear, as has already been determined by the Board, that one of the principal purposes of that meeting was to undermine the bargaining agent's authority. It was to enter into direct negotiations with employees which violates section 184(1)(a).

'The negotiation of collective agreements is at the core of a union's representation of employees. For an employer to ignore a collective agreement, by-pass the union, and make individual contracts with employees is direct interference with a union's representation rights (see Manitoba Pool Elevators (1980), 42 di 27; and [1981] 1 Can LRBR 44 (CLRB no. 272); section 28 application dismissed in Manitoba Pool Elevators v. Canada Labour

Relations Board et al., [1982] 2 F.C. 659; 39 N.R. 387; and 82 CLLC 14,160. ...'

(Intermountain Transport Ltd. (1984), 57 di 74; and 8 CLRB (NS) 141 (CLRB no. 480), pages 94; and 162)

It was to entice employees to give up the right to strike and to return to work. It was to lower the morale of those employees who were still on strike in an effort to, prematurely at least, from the union's point of view, end the strike under terms favourable to Brewster. It was done to force employees to give up their union affiliation as the employer would agree to take them back only if they first resigned from Brewster. That meeting results in a clear breach of section 184(1)(a) of the Code.

With regard to the union's second allegation, it is their contention that the employer was obligated to offer employees it had hired during the strike terms and conditions of employment that were no more favourable than those terms last offered to the union during negotiations. In support of that contention, it proposed that the Board adopt the principle accepted in the United States that, when an impasse is reached, the employer may make unilateral changes in working conditions but such changes must 'not be substantially different or greater than any offers which the employer proposed during negotiations.' (Atlas Tack Corp. (1976), 226 NLRB 17,442; 93 LRRM 1236, enforced 559 (f)(ii)(d) 1201, (1977), 96 LRRM 2660 (CA1).)

The result is that there will be a violation of section 8(a)(v) of the National Labor Relations Act when an employer gives wage increases to its employees which exceed those previously offered at the bargaining table, even if it is found that there was a continuing bargaining impasse at the time the increases were granted.

The Supreme Court of the United States in National Labor Relations Board v. Katz et al. (1962), 50 LRRM 2177, said the following:

'... Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining contrary to the congressional policy. ...'

(page 2182)

If the Board is to accept this proposition of the union, it would mean that an employer, while free to hire or to retain employees during the course of a strike, could not offer them terms and conditions of employment more favourable than those it was proposing to the union at the bargaining table at the point of impasse. The Board is of the view that such a policy is a logical one and fits with the legislative scheme envisaged by Parliament in Part V of the Canada

Labour Code. Section 136(1)(a) provides that a bargaining agent is the exclusive bargaining agent for all persons within a bargaining unit. Only the bargaining agent, therefore, is empowered to bargain on their behalf. If a strike commences and if an employer offers employees hired during the course of a strike better terms and conditions of employment than what it is offering through the agent at the bargaining table, then it is, in our view, passing a clear signal to employees that if they abandon the strike, the employer will give them more than what it is willing to give them while they remain a member of the union. That would be clearly contrary to the stated purpose of Part V of the Canada Labour Code and would be a clear interference with the exclusive role of the bargaining agent.

Thus, to ensure that such a situation does not occur, the Board agrees that the impasse theory as utilized in the United States is one which might equally be adopted within the federal jurisdiction; that is, where an employer wishes to offer terms and conditions of employment to persons during the course of a strike, those terms and conditions of employment must be, as was stated by the National Labor Relations Board in Taft Broadcasting Co. (1967), 64 LRRM 1386:

'... reasonably comprehended within his pre-impasse proposals.'

(page 1388)

Thus, the employer's proposal to engage employees during the strike and to offer them, at the July 7, 1985 meeting, terms and conditions of employment superior to those already offered to the bargaining agent, results in a violation of section 184(1)(a) of the Canada Labour Code.

The principle enunciated above might equally apply in the context of a violation of section 148(a) although it was not argued as such."

(pages 58-60; 397-399; and 14,296-14,397)

VII

If the Board relies on the criteria reviewed in its past decisions, can it conclude that there was bad faith bargaining in the instant case?

(a) The relocation and the terminations of employment

Let us examine first the relocation in Ottawa and the terminations of employment.

The testimony revealed that, on February 10, Voyageur was not ready to implement its proposal to relocate part of its office staff in Ottawa. It was apparently not until around that time that Voyageur began to actually look for offices, to call for tenders for office equipment and to take other steps.

We note in Voyageur Inc., supra, that the Board, in dealing with the old section 144 (sale of business), reached the following conclusion:

"This section, and in particular subsection (5), makes it clear that the Board shall determine the issue when it is a question of whether or not a business has been sold, the implication clearly being that the transaction has already taken place. In the instant case, by way of evidence, the union relied on a considerable number of documents emanating from the employer dealing with the possibility of a transfer of accounting functions from Voyageur Inc. to Voyageur Colonial Ltd. None of the documents filed by the union and none of the documents before the Board indicated that such a transaction has already taken place.

In terms of testimonial evidence in support of its application, the union called, as a witness, Mr. R.J. Holmes, Vice-president, Human Resources, for Voyageur. What emanated from Mr. Holmes' testimony was that the matter of transferring the accounting function has been contemplated for some time but has not yet taken place, and there is no firm date as to when it will or might take place.

No other evidence was submitted other than the letters referred to above, nor any other testimony heard other than that of Mr. Holmes. Thus, the Board has before it no proof indicating that a transaction has already taken place. Given that a condition precedent to making a declaration under section 144 is that there has been a transaction within the meaning of that section, the Board rejects the application."

(pages 4-5; emphasis added)

In that decision, the Board, addressing the complaint of unlawful terminations of employment, took the following position:

"We are unanimously of the view that the employer has omitted an unfair labour practice as a result of the dismissal of the employees in question. We believe that the employer had, from the month of August until the time of their dismissal, been using the threat of reorganizing the financial services, and ultimately the threat of dismissing the employees in question unless they agreed to its proposal, as an illegal tool to get them to enter into a collective agreement. We are not satisfied from either the documents submitted in evidence or Mr. Holmes' testimony, which was by agreement of the parties transferred from file 585-227 to the instant case, that the employer actually intended to transfer the accounting functions from Montréal to Ottawa. Mr. Holmes was quite categorical in his testimony that nothing had ever been put down on paper, that these were just ideas that were discussed and that no actual planning had been advanced. If the issue were a serious one, one would have to expect that, at the very least, the employer would have done some preliminary planning and considered some of the matters that normally come up in a case like this, such as looking for a locale in Ottawa, deciding on the equipment to be purchased, determining who is to be transferred, etc. None of this, according to Mr. Holmes, has been done.

Second, the timing of the final letter to the employees on January 27, 1988 was coincidentally close to the date of the union meeting, February 3, 1988, at which time the employees were to vote on the employer's latest proposal. This constitutes, in our opinion, an attempt to get the employees in question to vote in favour of the employer's proposal in order to save their jobs. It is our determination, therefore, that the employer has violated section 184(3)(a) of the Canada Labour Code."

(pages 11-12; emphasis added)

The evidence heard does not enable us to reach a different conclusion from the one our colleagues before us reached.

The threat of relocation in Ottawa and the letter of termination sent to the employees constituted a violation of not only section 94(3)(a) but also section 50(a) (see Brewster Transport Company Limited, supra). In using an unfair labour practice against its employees in order to force a settlement at the bargaining table, Voyageur also breached its duty to bargain in good faith.

(b) The staff cutbacks

We can say with certainty that the economy of North America is in the throes of change. Companies operating in the transportation industry are feeling the effect of deregulation, changes in consumer habits, foreign competition, and competition from other forms of transportation. A variety of economic pressures are forcing them to perform better if they hope to remain in business.

A document entitled New Direction for Labor and Management: Views from the Collective Bargaining Forum (Washington D.C.: U.S. Department of Labor, BLMR, 1988), is relevant to a discussion of these questions.

The Collective Bargaining Forum is a private group composed of business and labour leaders who examine ways to improve industrial relations in the United States.

This group recognizes the need for the various industries in the United States to adjust to increased competition. They question certain traditional practices and attitudes of American labour and business. Some of the issues with which they deal are relevant to Canada.

To survive in a global economy requires the co-operation of labour, management and governments.

The document gives, in essence, the following definitions of the role of each party.

The group reaffirms the important role of collective bargaining and of the objectives of the labour movement. It adds, however, that unions must be realistic and work together with employers to improve the economic performance

of businesses in order to enable them to adapt to technological change and new market conditions. However, to meet this objective, unions must be accepted by employers and governments. Governments must recognize that unions have a legitimate and valid role to play in an enterprise's decision-making process and in the development of government policies.

Management, which is responsible for producing competitive goods and services and earning a return on investments in order to ensure continuity of the business, must endeavour to adopt an investment and development strategy that will create and maintain good employment opportunities.

This new role for management requires employers to be more sensitive to employees' concerns, particularly in the area of job security.

The group has the following to say regarding job security:

"A fundamental obligation of a democratic society is to ensure that its economy produces an adequate number of productive jobs for the men and women in its work force, and opportunities for an improved standard of living for all of its citizens. Achieving employment security in a world economy now requires that workers be provided training opportunities to develop the skills necessary to perform a variety of different jobs over the course of a career. But, in a global economy employment security must be seen as a dynamic concept. It does not mean that an individual has a right to expect to hold any specific job indefinitely. It also implies that workers must be prepared to make and assist in a transition to a different employer more frequently than has been the case in the past.

Employment security as a corporate policy accepts the continuity of employment for its work force as a major policy objective. This commitment means that employment security will figure importantly in the corporate planning process at the same level of attention as is given product development, marketing, and capital requirements. It means that every viable action, including belt-tightening measures affecting all elements of a company's operations to maintain cost and quality competitiveness, will be taken as the 'action of choice', and that permanent separation of workers will be an action of last resort. It also means

that companies will not regard their commitment as satisfied when permanent layoffs are deemed necessary until all reasonable support has been provided to aid in the reemployment of redundant workers.

Designing policies to achieve employment security represents an ongoing challenge shared by employers, unions, workers, and the government. Employment security can only be achieved through a shared commitment to promoting the continuity of employment within an enterprise and to sharing the burden of adjustment and transition to new job opportunities when this is necessary."

(New Direction for Labor and Management, supra)

Recognizing that there are differences between the expectations and objectives of employees and employers, the study group notes that the two partners must pursue their efforts with a view to reaching a common goal. In the absence of a common direction, neither will attain its objectives. The two sides must respect one another and respond to each other's basic needs.

All these observations are not extraneous to the problems of Voyageur and the union. For example, an examination of article 11, entitled "Technological Change," and the proposed memorandum of understanding concerning the abolition of 20 positions, shows the willingness or unwillingness of Voyageur to address the type of problems described by the U.S. group.

The following is the employer's proposal:

"Article 11

Technological Change

.01 In the event of a technical or a technological change, the Company will take the necessary steps, as far as possible, to enable the employees affected to adjust to said change.

.02 In this regard, any employee hired to fill a position covered by the present bargaining unit prior to January 1, 1979 cannot be laid off or have his pay reduced because of a technical or technological change affecting the employees in the present unit.

The foregoing notwithstanding, where there is a reduction of personnel, the following provisions shall apply in accordance with the employee's choice:

(a) In the case of a lay-off, the employee shall have his name placed on a recall list and shall be recalled to work in accordance with the provisions of the present agreement.

(b) In the case of a termination of employment, the employee shall receive compensation equivalent to a week and a half of regular pay for each year of service as of the time of termination and shall terminate his employment with the Employer.

.03 Should it prove necessary to introduce a technological change in future, the Company shall give six months' prior notice if this change involves a reduction of personnel.

In this case, the provisions of paragraph 2 of article 11.02 shall apply and the provisions of paragraph 1 of article 11.02 shall be null and void. Having regard to the provisions of this agreement, sections 150, 152 and 153 of the Canada Labour Code shall not apply during the specified term of the collective agreement."

(translation)

In paragraph .03 of the proposal, the employer states that, after the signing of the collective agreement, when a technological change is to be introduced, it will give six months' prior notice if this change involves a reduction of personnel. Moreover, it makes clear that employees whose employment is terminated will receive compensation equivalent to a week and a half of regular pay for each year of service at the time of the action which terminates their employment with the employer. In the light of these apparently generous proposals, the employer requests that sections 52, 54 and 55 of the Code do not apply during the term of the agreement.

Moreover, the proposed memorandum of understanding prepared by the employer stipulates that it cannot lay off, following a technological change, "more than 20 employees" during the term of the agreement.

Paragraph 2 provides that employees who obtain positions in lower classifications will not suffer any pay reduction.

Paragraph 2.1 provides for the allocation of positions following restructuring in each classification in the unit.

However, paragraph 3 allows the employer to terminate these 20 employees without regard to their seniority, by compensating them and placing them on a recall list.

Paragraph 4 provides for the establishment of a committee to minimize the impact of the restructuring on the employees affected and to help them find employment outside of Voyageur.

Finally, the memorandum of understanding postpones "the coming into force of the provisions described in article 11.03" until December 31, 1989.

In short, the memorandum of understanding covers any change that the employer wishes to make immediately upon the signing of the collective agreement, specifically, until December 31, 1989, whereas the procedures set forth in article 11 cover situations that arise after December 1989. However, even if the protection afforded by article 11 does not cover all situations that may arise during the term of the agreement, paragraph .03 of this article stipulates that sections 52, 54 and 55 of the Code do not apply to the parties "during the specified term" of the collective agreement.

A section on technological change is included in the Code to ensure that this type of change can take place with due regard to the job security of employees affected. (In this regard, see George W. Adams, Canadian Labour Law: A

Comprehensive Text (Aurora: Canada Law Book Inc., 1985), page 695.) This section provides, inter alia, that certain provisions must necessarily be included in a collective agreement.

The section sets out what an employer must do when it is bound by a collective agreement or it finds itself in the process of negotiating one. It clearly indicates what a collective agreement must contain if sections 52, 54 and 55 are not to apply. One way of meeting this condition is to give the prior notice provided for in the Code. If the employer does so and then signs an agreement, it will not then be subject to the provisions in question.

Article 11 of the employer's proposed agreement clearly states, as the Code permits, that any future change will not be subject to sections 52, 54 and 55 of the Code. However, the text of article 11 and of the memorandum of understanding leads us to conclude that the employer failed to include in the agreement the provisions that must necessarily be included under the terms of section 51 of the Code. Specifically, this proposal, negotiated to impasse, does not meet the requirements of sections 51(2)(b) and 51(2)(c)(i). The employer reserves the right to act unilaterally without negotiation in the case of any change that it proposes to make, when it is far from certain that said changes are not covered by the definition in section 51. In the instant case, the Board considers this action bad faith bargaining.

(c) Communications with the employees

On a number of occasions, Voyageur communicated directly with the employees by letter. With one exception, the union was always informed in advance. The method of service by

bailiff, often in the evening, was more than a little upsetting to the employees. This tactic, though lawful, was in bad taste. The contents of these letters repeated the employer's position, which was already known, and reviewed the progress of negotiations. These letters contained nothing the union had not already heard or that could undermine its credibility.

However, the January 27, 1988 letter sent to the employees just prior to their meeting on February 3, 1988 is of particular interest to us.

In the letter, the employer, of course, reviews the negotiations, but it adds that if the employees do not accept the employer's position, it will terminate the employment of all financial services employees in Montréal, effective February 10, 1988.

We stated earlier that recourse to terminations of employment constituted bad faith bargaining. The Board adds that the January 27 letter, which was in fact part of the bargaining process, was a thinly veiled threat that sought to undermine the bargaining agent's authority. This letter also constituted evidence of bad faith bargaining.

The Code allows employers to communicate with their employees, but does not allow them to threaten them so as to force them to accept proposals. In so doing, Voyageur also contravened section 50(a).

(d) Replacement employees

The union could have tried to establish before the Board that Voyageur had offered its replacement employees conditions that were not offered at the bargaining table (see

Brewster Transport Company Limited, supra). It did not do so.

It is true that Voyageur hired replacement employees after the dispute began. Nothing in the documents produced before the Board or in the testimony heard allows us to conclude that the conditions offered these replacements individually were better than those offered the locked out employees. The union raised the matter of the security guards who must have represented a considerable expense for the employer. We believe that this argument by the union misses the point. The union seems to forget that the Code allows the hiring of replacements in the case of lockouts or strikes. There is no need to dwell further on this matter.

(e) The financial statements

The issue of the refusal to produce the financial statements was raised. We note that Canadian legislation, unlike American legislation and case law, is silent on this matter. There is, moreover, no real evidence of a refusal by Voyageur, but at most a resistance that the union did not try to overcome. The casual manner in which the union pursued this issue does not persuade us that it really wanted to know Voyageur's financial situation. It is an open secret that if one has first-hand knowledge of a genuine problem, it then becomes more difficult to deny its existence. In the absence of sufficient proof, the Board need not dwell further on the matter and can find no fault with Voyageur in this regard.

(f) Conclusions on the facts

In this dispute, the clauses that are still unresolved concern, inter alia, contract work, hours of work, workmen

compensation, statutory holidays, changes in personnel, and so on, and so forth. In short, all issues that are negotiable at a bargaining table, as is technological change.

The fact that the Board is allowing this complaint in part does not resolve everything. Both sides appear ready to exact a high price to obtain the concessions they want. So long as this attitude persists and they do not seriously consider new solutions, there will be no settlement. Furthermore, provided they do not act in bad faith, the parties are free to stick to their positions until doomsday, if that is their wish. This Board cannot settle their dispute. At most, it can remove from their path the obstacles that bad faith may have put in their way. It is the parties themselves that initiate disputes and they alone can resolve them.

IX

Having said this, the Board notes that where violations of section 50(a) occur, it has the following remedial powers under section 99:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

For the reasons stated earlier, the Board declares that Voyageur failed to bargain in good faith and to make every reasonable effort to enter into a collective agreement, contrary to section 50(a) of the Code.

The Board orders Voyageur to stop contravening section 50(a) and to comply with it.

Specifically, the Board orders Voyageur, in respect of any change that it wishes to introduce in its financial services and that was covered by the memorandum of understanding on technological change, to forward to the union and the mediator assigned to this case a proposal, to be accompanied by the following information:

1. the nature of the change being considered and the identity of the services affected;
2. the date on which Voyageur plans to introduce this change;
3. the maximum number of employees likely to be affected by this change, their category and their identity;
4. the effect that this change is likely to have on the terms and conditions of employment or the job security of the employees affected.

This information shall be communicated to the union not later than ten days following the date of the present decision.

The Board further orders Voyageur to withdraw its present demand concerning article 11 (Technological Change) and to

submit to the union, within the same time period or within any other time period agreed upon with the union, a new proposal that is in keeping with the Code, unless it abandons its demand concerning this clause.

The Board feels that, in the instant case, these measures will remedy the effects of the actions of the employer that contravened section 50(a) and that harm the attainment of the objects of Part I of the Code.

The Board reserves the right to issue additional orders if the parties encounter difficulties in implementing the present order.

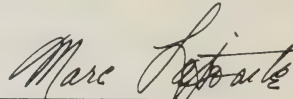
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In the course of these proceedings, the Board received another complaint (745-2983) alleging other contraventions of section 50(a), this time by the union. The present complaint was directed against the employer, but the union may not be blameless.

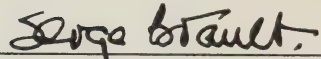
The Minister of Labour consented to Voyageur's filing with the Board a complaint directed specifically against the four CNTU unions, including the complainant union in the instant case, that are certified to represent Voyageur employees. If the Board did not hear that complaint, it is because counsel for Voyageur suggested that it be held in abeyance until the present complaint was decided. This has now been done. In any case, if this dispute is not resolved, the Board will have to hear that complaint.

Despite the poisoned atmosphere that characterizes the negotiations, the Board nevertheless urges both parties to sit down at the table and settle their dispute

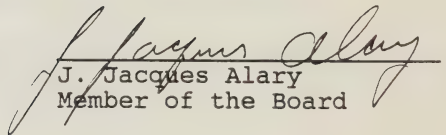
realistically. It is in the interests of both sides to understand that successful collective bargaining, even very hard bargaining, depends in large part on the degree of realism and clear-headedness displayed. Conciliation is always better than humiliation. We hope that the senior officials on both sides are aware of this fact and that they will ensure that their respective spokespersons are also fully aware of it.



Marc Lapointe, Q.C.
Chairman



Serge Brault
Vice-Chairman



J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 10th day of March 1989.

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SUMMARY

Georges Picotin, complainant, International Association of Machinists and Aerospace Workers, Local 2309, respondent union, and Canadian Airlines International Ltd. (formerly Nordair Ltd.), employer.

Board File: 745-3089

Decision No.: 756

This case deals with a complaint alleging that a union violated section 37 of the Canada Labour Code (Part I - Industrial Relations) by breaching its duty of fair representation following a dismissal. It was dismissed as untimely pursuant to section 97(2) of the Code.

RESUME

Georges Picotin, plaignant, l'Association internationale des machinistes et des travailleurs de l'aéroastro-nautique, section locale 2309, syndicat intimé, et Les lignes aériennes Canadien International (ci-devant Nordair Ltée), employeur.

Dossier du Conseil: 745-3089

Décision n°: 756

Plainte de violation du devoir de juste représentation (article 37 du Code canadien du travail (Partie I - Relations du travail) à l'encontre d'un syndicat à la suite d'un congédiement. Plainte rejetée parce que déposée hors délai, paragraphe 97(2) du Code.



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Georges Picotin,

complainant,

and

International Association of
Machinists and Aerospace Workers,
Local 2309,

respondent union,

and

Canadian Airlines International
Ltd. (formerly Nordair Ltd.),

employer.

Board File: 745-3089

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Mrs. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances:

Mr. Claude Tardif, for the complainant;

Mr. Harold C. Lehrer, for the respondent union; and

Mr. Kevin C. Smith, for the employer (September 8, 1989).

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

This case deals with a complaint of unfair labour practice
filed by Mr. Georges Picotin, alleging violation of section
37 of the Canada Labour Code (Part I - Industrial
Relations). The complainant alleges that the International
Association of Machinists and Aerospace Workers, Local 2309
(the IAM or the union), breached its duty of representation
following his dismissal.

A hearing was held in Montréal on June 29 and September 8
and 15, 1989.

II

Until his dismissal, Mr. Picotin was employed as a baggage attendant by Nordair Ltd. at Dorval Airport. It was Nordair Ltd. that was the mis-en-cause in the initial proceeding and when the hearings began. However, counsel for Canadian Airlines International Ltd. (CAIL) appeared at the hearing on September 8, 1989 and requested that the Board amend the wording of the complaint to substitute CAIL for Nordair Ltd. Counsel explained, with the consent of the other counsel, that as the result of a series of transactions that constituted sales of businesses within the meaning of the Code, CAIL was now the employer that was a party to labour relations with the union. Following this intervention by counsel for CAIL, the proceeding was amended for all legal purposes, without further ado, with the agreement of all the parties present.

Mr. Picotin was dismissed on March 9, 1987. At all times relevant to this proceeding, the complainant was governed by a collective agreement concluded between Nordair Ltd. and the union.

At the time of his dismissal, Mr. Picotin had been off work for more than four years following a work accident. During all this time, he received benefits from Quebec's Occupational Health and Safety Commission (OHSC). This absence was the climax to a long series of absences from work, as the result of which, the employer argued, Mr. Picotin had been absent from work more often than he had been present since he was hired. This was the reason the employer gave for dismissing him.

Without reciting Mr. Picotin's pleadings chapter and verse, we note that he essentially complains that after informing

his union in March 1987 of his dismissal, the union assured him that he had no cause to worry and that as soon as his health permitted him to return to work, steps would be taken to ensure that he resumed his duties. Encouraged by these assurances, the complainant testified, he stepped up his efforts, both medical and administrative, to obtain from the OHSC the certification required to enable him to resume his duties as a baggage attendant. When some 18 months after his dismissal he finally obtained the medical certification required, he then approached the union, he said, to have them take steps to secure his reinstatement. It was then that he learned that his union had done nothing to contest his dismissal and that it was too late to do anything for him. Claiming to have been deceived by his union and denied any recourse against his dismissal, he therefore filed a complaint with the Board.

The union's version largely contradicts Mr. Picotin's version and advances two principal opposing arguments. The first concerns the time limit. According to the union, Mr. Picotin was informed as early as 1987 and by the spring of 1988 at the latest of his union's inaction and that the complaint he brought in the fall of 1988 was prescribed owing to the mandatory nature of the time limit specified in section 97(2), which states the following:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

The union's second argument is a factual one. The union essentially claims that when Mr. Picotin was dismissed he did not inform union representatives, or if he did, he did not ask them to file a grievance, and he was thus the author of his own difficulties. The correspondence exchanged prior

to the hearing did not enable the Board to obtain from the union a clear statement of its position, and it was not until the hearing began that these arguments were presented, at the Board's request.

III

Mr. Picotin is an unskilled worker, with little education, who has difficulty expressing himself. He also has great difficulty reading.

At the hearing, we had the opportunity to hear Mr. Stéphane Aubin, an OHSC rehabilitation specialist and a psychologist by training. Mr. Aubin was the OHSC officer assigned to Mr. Picotin's case at all times relevant to this proceeding.

The Board received in evidence the OHSC's complete file on Mr. Picotin. This very voluminous file reveals that Mr. Picotin had a number of disagreements with the OHSC which, as far back as 1986, had concluded that his condition had stabilized. Efforts were thus made to persuade him to return to the labour market, but in a different job, because expert opinion at the time had diagnosed Mr. Picotin as suffering from a permanent, partial disability that precluded his returning to his job at Nordair Ltd. Mr. Picotin took issue with this diagnosis, believing, first, that he was not fit to resume work and, second, that with further treatment he would fully recover his strength and thus be able to return to his original position. These differences of opinion could, of course, affect the benefits and allowances that Mr. Picotin had at that point been receiving from the OHSC for a number of years.

The differing testimony given by Mr. Picotin and by certain union representatives, namely, Messrs. Raymond Landry,

Albert Brouillette , Gilles Leduc and, finally, Terry Harrison, was analysed in particular in the light of the testimony of Mr. Aubin, the only independent witness heard in this case. Moreover, this testimony was supported by the OHSC file containing the notes taken over a period of time by Mr. Aubin whose credibility, moreover, was not questioned by the parties.

The Board believes that the most plausible version of what happened is as follows. In March 1987, Nordair Ltd. decided to dismiss Mr. Picotin. It communicated its decision in writing to both the complainant and the union. Mr. Picotin was then sent the documentation that is standard in this situation, including that relating to severance pay. At the time, Mr. Picotin was involved in a proceeding before the OHSC where he argued that he was still incapable of resuming any job, but could fully recover from his illness and return to his former job.

After reading the letter of dismissal, the complainant went to Nordair Ltd. and met with a union representative, Mr. Albert Brouillette, who has since become president of the Local. During this visit, Mr. Picotin apparently claimed payment of a wage increase for vacation due because Nordair Ltd. had just granted its employees new working conditions. He discussed his dismissal with Mr. Brouillette who advised him to go and see the OHSC if he wanted his problem solved. He also apparently told him not to worry and that when he had recovered, the necessary steps would be taken to reinstate him in his former position.

Having been reassured by Mr. Brouillette, a few days later Mr. Picotin visited the OHSC's office where he met with Mr. Aubin. The latter said that he was used to these cases

where different parties involved try to pass the buck, whether they represent the union or the employer. Expressing surprise that the union could have suggested to Mr. Picotin that he seek the help of the OHSC following his dismissal, Mr. Aubin telephoned Mr. Brouillette in Mr. Picotin's presence. Mr. Brouillette admitted to him that he was not very familiar with these matters. He added that the union executive was scheduled to meet in a few days and that he would submit the problem to it and get back to Mr. Aubin to inform him of the union's position. The Board notes in passing that, by that time, according to counsel for the union, the time limit for contesting a dismissal under the collective agreement had already expired. Three weeks later, Mr. Aubin had still not heard anything from the union and he therefore contacted Mr. Brouillette again. Mr. Brouillette, who claimed in his testimony that he was never informed of the complainant's dismissal, told Mr. Aubin that the union could do nothing since Mr. Picotin was in no condition to return to work and that it would take no action to protect Mr. Picotin's job.

The evidence produced by the union provides no indication that this union decision was communicated directly to Mr. Picotin. It would, moreover, have been very surprising had this been the case because, according to its version, the union did not even know that Mr. Picotin had been dismissed and it did not therefore deny him anything.

It was Mr. Aubin who relayed this information to Mr. Picotin. Did Mr. Picotin understand the message? According to Mr. Aubin, he understood clearly, but did not appear to believe what he heard. It was now April 1987.

A year later, as a result of the initiatives he took with both the OHSC and doctors, Mr. Picotin was given a

prognosis of full recovery and pronounced fit to resume his duties. He visited Nordair Ltd. and met with Mr. Terry Harrison, another union representative. This was Mr. Harrison's first involvement with Mr. Picotin's case. He intervened at the request of Mr. Raymond Landry, president of the Local, who was detained in Vancouver in connection with the sales of businesses mentioned earlier. Mr. Picotin, who asked Mr. Harrison about the new rates of pay, said that he was ready to report for work. He did not mention his dismissal. Mr. Harrison, who knew nothing of this case, sought information from the personnel department. He went to the personnel office, consulted the file and discovered to his great displeasure that Mr. Picotin had been dismissed more than 12 months earlier. He was nearly furious with Mr. Picotin and told him that he had his nerve asking him to settle employment details when he had failed to tell him that he had been dismissed. Mr. Harrison, who sat on the union executive in 1987, did not recall the executive's ever having discussed Mr. Picotin's case and he therefore knew nothing of it when he consulted the personnel office. He provided us with specific details of the circumstances of his visit to the personnel office, of the physical appearance of Mr. Picotin's file and of his own reaction to Mr. Picotin. He did not mince his words: he told the complainant that it had taken him more than a year to bring a complaint of dismissal and that the union could do nothing more for him. Clearly, he informed him while the union did nothing. It was now April 1988.

Despite all this, Mr. Picotin continued his initiatives and approached other union representatives who, in all likelihood, were trying to avoid him. Later, he met again with Mr. Brouillette who told him that he could do nothing for him and that Mr. Picotin clearly had no choice but to file a complaint with this Board. It was the end of the

summer of 1988. Mr. Picotin filed his complaint on December 6, 1988.

IV

Section 37 of the Code provides that:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

After hearing and weighing the evidence, the Board first considered the question of the time limit raised earlier. The time limit that applies in this case is the one prescribed by section 97(2) cited earlier at page 3. The Supreme Court of Canada was very categorical on this matter in Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902; (1979), 95 D.L.R. (3d) 25; and 25 N.R. 149:

"... I do not share this view, but I am of the opinion that s. [16(m)] is not applicable for another and more fundamental reason, namely, that it does not empower the Board to alter a substantive provision of the statute prescribing a time limit for filing complaints."

Section [16(m)] is as follows:

'[16. The Board has, in relation to any proceeding before it, power

...

(m) to abridge or enlarge the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence in connection with the proceeding;]

I read this provision as empowering the Board to abridge or enlarge the time for taking steps in a proceeding which is properly before it, as, for example, a certification proceeding. If, however, the issue is whether a proceeding is timely under the Board's governing statute, that is, whether the Board can lawfully entertain it at all in the light of s. [97(2)], I do not regard its powers under s. [16(m)] as entitling it to give latitude to a complainant who is out of time under the statute. The correlative would be that if it can enlarge it can abridge, and that would be absurd. A complainant is entitled to the advantage and is subject to the limitation of the ninety day period

under s. [97(2)]. It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period."

(pages 914-915; 34; and 160-161)


The Code provides that the time for exercising a recourse expires 90 days after the person knew or ought to have known of the action or circumstances giving rise to the complaint. In the present case, the act that gave rise to the complaint is the union's negligence or its refusal to act. According to Mr. Picotin, he did not learn until the fall of 1988 that his union had refused or neglected to represent him. However, it appears to be clearly established that Mr. Harrison informed Mr. Picotin in April 1988 that the union could not do anything. Could Mr. Picotin have known at that point that the union had not done what, in his opinion, it ought to have been doing for 12 months, namely, contesting his dismissal? We believe so. When Mr. Harrison informed Mr. Picotin that nothing could be done in his case, he was obviously telling him that nothing had been done. We believe that at that point Mr. Picotin should have known that his rights were in danger and acted to protect himself.

Moreover, having examined the various events that took place in the spring of 1987, we cannot accept Mr. Brouillette's version, which is contradicted by both the OHSC's file and the very clear testimony of the OHSC official. In all likelihood, at the time, Mr. Brouillette had either not even raised the Picotin case with the union's executive or had discussed it with the executive and it had decided to do nothing. However, they neglected to inform Mr. Picotin. An attempt was made to attribute this silence on the part of the union to the fact that Mr. Picotin had not informed the union of his dismissal. This version is not plausible. To begin with, the union was informed of the dismissal in writing by the employer. The idea that the union secretary,

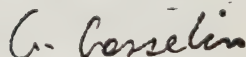
who moreover did not testify, may have merely opened the mail and filed the dismissal letter without telling anyone about it is hardly likely. Moreover, Mr. Aubin approached the union twice about its intentions regarding Mr. Picotin. It is hard to see what he could have discussed with Mr. Brouillette if not the dismissal. When Mr. Brouillette told the OHSC official in April 1987 that the union planned no action to protect Mr. Picotin's job, he obviously was speaking of his dismissal.

Whatever the validity of the union's position, it seems very clear that in April 1987 Mr. Picotin was clearly informed by Mr. Aubin of the OHSC that his union intended to do nothing for him. Mr. Aubin's testimony in this regard is categorical. It seems only plausible that Mr. Picotin decided to pursue certain remedies with the OHSC. However, the mandatory time limit prescribed by the Code continued to run regardless of this decision.

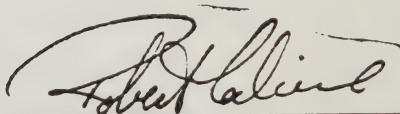
On the basis of this evidence, the Board concludes that Mr. Picotin's complaint was not filed within the time limit prescribed by section 97(2) and it is therefore dismissed.



Serge Brault
Vice-Chairman



Ginette Gosselin
Member of the Board



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 28th day of September 1989.

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Summary

INTERNATIONAL BROTHERHOOD OF
LOCOMOTIVE ENGINEERS, DIVISION 558,
QUEBEC, COMPLAINANT, AND VIA RAIL
CANADA INC., RESPONDENT.

Board File: 950-96
Decision No. 761

Occupational safety and health.
Complaint pursuant to section 133(1)
of the Canada Labour Code (Part II -
Occupational Safety and Health).
Allegation of violation of section
147(a) of the Code. Discipline
imposed on two employees who invoked
their right to refuse to use or
operate a machine for safety
reasons. Complaint allowed.

VIA raised an objection pursuant to
section 133(3) of the Code in view
of the complainant's alleged failure
to notify a member of the safety and
health committee or an officer of
Labour Canada. Objection dismissed.
The Board concluded on the merits
that VIA had violated section 147.

As a remedy, the Board ordered VIA
to rescind the disciplinary actions
and to compensate the employees for
loss of salary and other benefits,
including the salary lost because of
their participation in the hearings.

Résumé de Décision

FRATERNITE DES INGENIEURS DE
LOCOMOTIVES, DIVISION 558, QUEBEC,
PLAINNANTE, ET VIA RAIL CANADA INC.,
INTIME.

Dossier du Conseil: 950-96
No de Décision: 761

Sécurité et santé au travail.
Plainte en vertu du paragraphe
133(1) du Code canadien du travail
(Partie II - Sécurité et santé au
travail). Violation alléguée de
l'alinéa 147a) du Code. Mesures
disciplinaires imposées à deux
employés qui se sont prévalus de
leur droit de refuser de se servir
ou de faire fonctionner une machine
pour des motifs de sécurité.
Plainte accueillie.

Via Rail formule une objection en
vertu du paragraphe 133(3) du Code,
vu le défaut allégué des plaignants
d'avoir prévenu un membre du comité
de sécurité et santé ou un agent de
Travail Canada. Moyen rejeté. Sur
le fond, le Conseil a jugé que Via
Rail avait enfreint l'article 147.

En guise de redressement, le Conseil
a ordonné à Via Rail d'annuler les
mesures disciplinaires et
d'indemniser les employés pour
toutes pertes de salaire et d'autres
avantages y compris le salaire perdu
en raison de la participation des
employés aux audiences.



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| Relations du |
| Travail |

Reasons for decision

International Brotherhood of
Locomotive Engineers, Quebec
Division 558,

complainant,

on behalf of

Luc Nolin and Daniel Gauthier,

employees,

and

VIA Rail Canada Inc.,

respondent employer.

Board File: 950-96

The Board was composed of Mr. Serge Brault, Vice-Chairman, Ms. Louise Doyon, Vice-Chair, and Mr. Robert Cadieux, Member.

Appearances:

Mr. Richard Bailey, for the International Brotherhood of Locomotive Engineers; and

Mr. Domenic Scalia, for VIA Rail Canada Inc.

These reasons for decision were written by Mr. Robert Cadieux, Member.

I

PROCEDURE

This case deals with a complaint made pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health), in which the International Brotherhood of Locomotive Engineers, Quebec Division 558 (the union), alleges that VIA Rail Canada Inc. (the employer or VIA) contravened section 147(a) of the Code by taking disciplinary action against Luc Nolin and Daniel Gauthier (the complainants). Messrs. Nolin and Gauthier complain that they were suspended for exercising their right under the

Code to refuse to use or operate a machine for safety reasons. The complaint was sent to the Board on September 24, 1988. A hearing was held in Québec on June 27, 1989.

Some of the relevant provisions of the Code read as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee..."

II

THE FACTS

Messrs. Nolin and Gauthier are locomotive engineers at VIA. On July 15, 1988, they were assigned in this capacity to locomotive 6763 at the Montréal Central Station from where passenger train number 620 was to depart for Québec at 9:00 p.m. The complainants boarded the locomotive at

8:40 p.m. The weather was dull. Upon boarding locomotive 6763, they noticed that the windshield was spattered with oil to the point where, in their opinion, their view was obstructed.

As is the practice, Mr. Nolin asked the train co-ordinator, Mr. Raymond Labrosse, to have someone clear the soiled windshield. Mr. Labrosse asked an employee to do this work and, a few minutes later, the employee arrived accompanied by his foreman. From a distance, he sprayed the windshield of the locomotive while his foreman turned on the windshield wipers.

Neither a cloth nor any other device was used in the cleaning. Complainant Nolin felt that this procedure was inadequate. In his opinion, spraying the windshield from the boarding platform and turning on the windshield wipers merely spread the oil over the windshield, leaving the surface of the glass smeared or streaked. Mr. Nolin then asked the employee and his foreman why he was not using a brush or another tool to do a proper cleaning and why the employee did not climb onto the locomotive to scrub the windshield. He was told that under a recent directive, cleaning staff no longer had to climb onto locomotives following an accident that had occurred during a similar manoeuvre.

Complainant Nolin is a member of the safety and health committee at VIA. The safety problem posed by the dirty windshield was not therefore new to him. In fact, this question had been repeatedly placed on the agenda of meetings of this committee, notably four days before the incident at issue here.

Since the complainants did not feel that the windshield had been adequately cleaned, they therefore refused to leave the station, citing a danger to their safety and that of their passengers. They informed the train co-ordinator, Mr. R. Labrosse, of their decision. A few moments later, Mr. Labrosse, another co-ordinator and the foreman in charge of cleaning assessed the situation. In their opinion, the visibility was satisfactory. Messrs. Nolin and Gauthier disagreed and repeated their refusal to leave the station under conditions they considered dangerous. Without further ado, the co-ordinators informed the complainants that they were relieved of their duties ("removed from active service") and they were asked to leave the premises immediately. They complied. Unable to find any replacements, VIA was obliged to transport the passengers to Québec by bus, which departed around 9:00 p.m.

A few days later, VIA summoned the complainants to a disciplinary hearing and suspended them for 15 days without pay for insubordination. These suspensions gave rise to their complaint.

III

ARGUMENTS OF THE PARTIES

The complainants argued that their insistence that a dirty windshield posed a danger while they were responsible for a passenger train led directly to their suspension. They cited the protection afforded by the provisions of Part II of the Code and asked that these disciplinary measures be rescinded.

For its part, the employer advanced two arguments against the complaint. The first is a procedural argument relating

specifically to section 133(3) of the Code, which reads as follows:

"133.(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint."

According to counsel for VIA, the Board could not grant this complaint because the complainants failed to notify either a member of the safety and health committee or a Labour Canada safety officer.

The second argument advanced by VIA is that the evidence established that no danger existed, thereby confirming the validity of the disciplinary measures imposed in the instant case.

IV

(A) DECISION CONCERNING THE ARGUMENT BASED ON SECTION 133(3) OF THE CODE

The events that gave rise to this complaint lasted some 30 minutes. VIA believes that the complainants cannot avail themselves, in the instant case, of the normal remedies because of section 133(3), cited above. According to VIA, the incident was not reported to a member of the safety and health committee, contrary to section 128(6), or to a Labour Canada safety officer, contrary to section 129(1).

We know that Mr. Nolin himself was a member of the committee in question and, furthermore, that he notified his employer of the situation, as is required by the Code. As the Board has explained in previous decisions, the fact of notifying the employer was sufficient to meet the requirement set

forth in section 128(6) (in this regard, see Mary Glover et al. (1988), as yet unreported CLRB decision no. 672; Lila K. Walker and David W. Bryant (1989), as yet unreported CLRB decision no. 754; and Denis Malboeuf (1989), as yet unreported CLRB decision no. 757).

Section 128(6) reads as follows:

"128.(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected."

Section 129(1) stipulates the following:

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

In Canada Post Corporation (1989), 3 CLRB (2d) 253 (CLRB no. 727), the Board had the following to say:

"... What it [the CPC] did was to short-circuit the whole system by immediately disciplining the refusing employees. This is exactly the type of mischief that section 147 of the Code is designed to prevent. When an employer acts like CPC has here, the Board can only presume that the disciplinary measures were taken because the employees had acted in accordance with the Code. In the circumstances, the Board need not even debate whether the employee correctly interpreted or applied the right to refuse provisions of the Code. By the employer's very actions, the contravention of the Code was a 'fait accompli.'"

(page 263)

The same reasoning applies where the employer disregards its obligation under section 129(1) to notify a Labour Canada inspector, and especially where it punishes an employee immediately and makes any recourse to Labour Canada impossible.

For these reasons, the Board rejects VIA's argument based on section 133(3).

(B) DECISION ON THE MERITS

Section 133(6) places the burden of proof in this type of complaint on the employer:

"133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

VIA was obliged to provide convincing proof in order to discharge the burden that section 133(6) of the Code establishes. The Board had the following to say on this subject in Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618):

"... If the exercise of rights under the Code by an employee is even only a proximate cause for discipline or for any other act by the employer that is prohibited by section [147], then the employer should be found to have contravened the Code. The only onus carried by the employee should be to satisfy the Board that the refusal was based on genuine safety concerns."

(page 73)

According to the evidence, the windshield was indeed dirty and this condition was obstructing the view. The fact that someone else might have found the visibility adequate does not alter the fact that it is the complainants' view that

we are dealing with here. Evidence was presented to the Board concerning the extent of the cleaning and the method used. If we think of the normal way of cleaning a car windshield, it is very likely that the locomotive's windshield did not receive a good cleaning. Spraying the windshield from a distance while activating windshield wipers that swept only part of the surface obviously could not remove the oil that covered the windshield. For reasons that may seem surprising, it was decided to evacuate the train rather than allow someone to clear the windshield thoroughly.

According to VIA, the complainants had no reasonable cause to exercise their right of refusal. The Board had the following to say in Roland D. Sabourin, supra:

"In cases of this type, a major consideration is whether the employee who has exercised the right to refuse did have reasonable cause to believe that danger existed. ...

The Ontario Labour Relations Board has taken a similar approach in these cases. Its policy was expressed in General Motors of Canada Limited, [1980] OLRB Rep. May 700:

'... The concept of insubordination is singularly inappropriate in situations where an employee is refusing to work in an honest (although mistaken) belief that his health or safety may be threatened. We accept the view, ... that in such matters one should err on the side of caution and prudence. An employee should not be penalized for doing so, nor should this Board be unduly concerned if bona fide concerns for employee safety result in occasional disruptions of the employer's production process. ...'

(page 709)

It appears to me that this approach is necessary if Part [II] is to be applied in the spirit in which it was intended. ... When employees complain that reprisals have been taken against them because they have exercised their right to refuse under the Code, the main focus should be on the reasons behind the employer's decision to take disciplinary action rather than on the reasonableness of the employee's refusal. ..."

(pages 72-73; emphasis added)

The Board is satisfied that the complainants' refusal was legitimate and was not unreasonable, given the circumstances.

VIA took disciplinary action against the employees. This type of action is prohibited by section 147 of the Code.

V

CONCLUSION AND REMEDY

The Board concludes that VIA Rail contravened section 147 of the Code by suspending Messrs. Luc Nolin and Daniel Gauthier and relieving them of their duties.

Sections 134(c) and (d) of the Code read as follows:

"134. Where, under subsection 133(5), the Board determines that an employer has contravened paragraph 147(a), the Board may, by order, require the employer to cease contravening that provision and may, where applicable, by order, require the employer to

...

(c) pay to any employee or former employee affected by the contravention compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to that employee or former employer; and

(d) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by the contravention, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer."

The Board therefore rescinds the disciplinary measures imposed by VIA on the complainants and orders VIA to delete from their files any reference to this action.

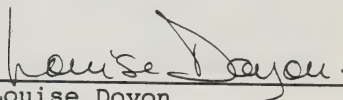
VIA Rail shall also compensate the complainants without delay for any loss of salary and other benefits they may

have suffered as a result of the company's unlawful conduct. This includes all salary or benefits the employees lost while they were attending the hearings held by the Board (in this regard, see Lila K. Walker and David W. Bryant and Denis Malboeuf, supra). Finally, the Board appoints Mr. Pierre Thivierge, senior labour relations officer, to assist the parties in resolving all questions arising from these remedies.

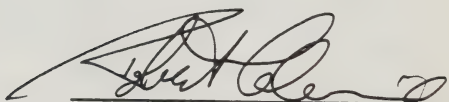
The Board shall retain jurisdiction over any question arising from the application of the present decision and may make, as required, a formal order to give effect to the said decision.



Serge Brault
Vice-Chairman



Louise Doyon
Vice-Chair



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 31st day of October 1989.

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SUMMARY

Raymond Tremblay, complainant, the International Association of Machinists and Aerospace Workers, union, Canadian National, Montréal, Quebec, employer, and Richard Dupuis, Labour Canada safety officer.

Board File: 950-125

Decision No.: 764

This case deals with the reference to the Board, pursuant to section 129(5) of Part II of the Code, of a decision whereby a safety officer found that there was no danger. The complainant refused to operate an axle sand blasting machine on the grounds that the repeated bending and tensing back movements required to do this work constituted a danger per se, which furthermore was aggravated by his own state of health.

The Board concluded that the machine or its use did not constitute a danger. When considering the validity of the safety officer's report with respect to the complainant's state of health, the Board concluded that the evidence adduced was not sufficiently clear to find that there was danger.

RESUME

Raymond Tremblay, plaignant, et l'Association internationale des machinistes et des travailleurs de l'aérospatiale, syndicat, et Canadien National, Montréal (Québec), employeur, et Richard Dupuis, agent de sécurité de Travail Canada.

Dossier du Conseil: 950-125

N° de décision: 764

Renvoi au Conseil en vertu du paragraphe 129(5) de la Partie II du Code de la décision de l'agent de sécurité concluant à l'absence d'un danger. Le plaignant a refusé de faire fonctionner une sableuse à essieux au motif que les mouvements répétitifs de flexion et de tension du dos qu'exigeait ce travail constituaient en soi un danger qui, par ailleurs, était accentué par son propre état de santé.

Le Conseil a conclu que la machine ou son opération ne constituait pas un danger. Analysant le bien-fondé du rapport de l'agent de sécurité touchant l'état de santé du plaignant, le Conseil a constaté qu'il ne disposait pas d'éléments de preuve suffisamment clairs pour conclure à l'existence d'un danger.



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Raymond Tremblay,
complainant,
and

International Association of
Machinists and Aerospace Workers,
union,
and

Canadian National,
Montréal, Quebec,

employer,

and

Richard Dupuis,

Labour Canada safety officer.

Board File: 950-125

The Board was composed of Ms. Louise Doyon, Vice-Chair, sitting as a single-member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. Raymond Tremblay, on his own behalf, accompanied by Mr. Guylain Lavoie, union representative, Safety and Health Committee;

Mr. Serge Goulet, for the union;

Messrs. Robert Lavigne and Pierre Beaupré, for the employer;
and

Mr. Richard Dupuis, on his own behalf.

I

Recourse

This case deals with the reference to the Canada Labour Relations Board, pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health), of

the decision of a safety officer. A hearing was held in Montréal on October 6, 1989, on which occasion the Board visited the work place.

Section 129(5) stipulates the following:

"129.(5) [Reference to Board] Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

Section 130(1) of the Code specifies the powers that the Board may exercise in such circumstances:

"130.(1) [Inquiry] Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

II

Decision of the safety officer

The complainant is a machinist who has been employed by Canadian National for some ten years. He works in the wheel shop at Pointe St-Charles in Montréal.

The circumstances that gave rise to the reference request are as follows. On June 29, 1989, the complainant was

assigned to operate axle sanding machine #1774. He refused to do this work and submitted the following written complaint to his employer:

"Because of two previous work accidents that caused me back problems, I refuse to do the work assigned to me this morning on axle sanding machine (mechanics) #1774, because this machine does not operate properly as the feed does not operate in reverse, which requires me to assume poor posture while working."

(translation)

The employer's reply to this complaint states the following:

"In its present condition, this machine, which is used solely to clean axles and which has always been used for this purpose, poses no danger to the health and safety of an employee."

(translation)

In response, the complainant continued to refuse to operate axle sanding machine #1774 and a Labour Canada safety officer was called to the work place, in accordance with section 129(1). After conducting an investigation in the presence of the complainant, a representative of the Safety and Health Committee and a representative of the employer, the safety officer informed the parties orally of his finding, namely, that "operating axle sanding machine #1774 in the wheel shop poses no danger." The safety officer's report of July 6, 1989 gives the reasons for this finding:

"7.0 Decision of the safety officer"

After examining the facts at my disposal and whereas:

- 1. sanding machine #1774 is in good working condition and shows no apparent sign of any fault,*
- 2. operating the axle sanding machine is relatively light work requiring little effort,*
- 3. the employee was not assigned to light work and had not done any since January 1989,*
- 4. the employee is a machinist and operating an axle sanding machine is part of his duties,*

I decide that operating axle sanding machine #1774 in the wheel shop poses no danger."

(translation)

This decision gave rise to the present reference.

III

Arguments of the parties

When the hearing began, the Board asked the parties to summarize their arguments and the conclusions sought. The complainant reiterated that the axle sanding machine posed a danger in that the reverse feed had to be done manually by the operator using a handle, whereas the forward feed was done automatically.

The safety officer's report contains the following summary, which was not contradicted by the complainant, of the main features of the operation of this machine:

"6.0 Investigation by the safety officer

Sanding machine #1774, which is at issue here, is in the wheel shop near the foremen's office. A 36-inch railing separates the machine from a passageway. The feeding and removal of axles are done automatically by a system of hydraulic levers.

The work consists in cleaning the ends of the axles using emery paper and varsol. Using a brush, the employee applies varsol to one end of the axle, and using handles on the front of the sanding machine, he ensures that sufficient pressure is applied to the axle by the emery paper.

The forward movement of the machine is automatic, whereas the reverse movement is performed using the carriage handle.

When the cleaning of the two ends is completed, the machine is fed another axle, the emery paper is changed, and the process begins again.

It was estimated that the machine operator can clean an average of 40 axles per day. One complete cycle takes 5 to 10 minutes and the operator should spend an average of one minute per axle manipulating the handles during the reverse movement, for a total of 40 minutes per day. ..."

(translation)

In essence, the complainant argues that the posture he must assume to perform manually the reverse operation exposes his back to repeated bending and flexing movements. In his opinion, the repetition of this particular movement while operating the machine is a danger in itself that is aggravated and accentuated by his own physical condition.

The complainant explained that this was the second time, on June 29, 1989, that he had been assigned to operate this machine. The first time, in March or April 1989, he verbally refused to do this work, and his employer accepted this refusal. He was then assigned other work.

The complainant is asking that axle sanding machine #1774 be modified by adding an automatic reverse feed, like the automatic forward feed with which it is already equipped.

For his part, Mr. Alain Rhéaume, foreman of the wheel shop and the complainant's immediate supervisor, explained to the Board that axle sanding machine #1774 has had a manual reverse feed for at least 20 years. He added that on June 29, 1989, following the complainant's initial refusal to operate the machine in question, he checked the machine's operation and the reverse feed handle. According to him, the reverse feed could be performed with one finger. He then stated that he was satisfied that the machine posed no danger. When the complainant continued to refuse to work, the Labour Canada safety officer was summoned to the work place.

The employer asked the Board to dismiss the complainant's application because, in its opinion, the safety officer correctly assessed the situation. He concluded that if the complainant was having difficulty operating this machine or was inconvenienced by so doing, it was due to his own physical condition and operating it did not therefore pose a danger within the meaning of the Code.

IV

Visit to the work place

The Board visited the wheel shop where the complainant works. This visit enabled it to assess the accuracy of the description of axle sanding machine #1774 given by the safety officer. The existing machine is the result of modifications to what was originally an axle lathe. At the time of this modification, the design did not include an automatic reverse feed, unlike machine K1032. The latter machine, which is not identical to machine #1774 but which, according to the complainant, can serve as basis for comparison, is used to cut axles and occasionally to sand them. Machine K1032 is also a modified axle lathe. In short, this machine is operated using buttons only and there is no need to change position continually as is the case when manually operating the reverse feed on machine #1774.

The Board also visited the other work stations to which the complainant may be assigned. Mr. Tremblay, like all machinists, is required to perform all the duties that are carried out in the wheel shop. The particular job or operation to which an employee is assigned is determined by the employer, and the length of assignments may vary from one to several days.

Following the visit to the work place, the parties presented their oral evidence.

Evidence

At the complainant's request, Mr. André Guérin, a machinist assigned to the wheel shop, testified that he himself was assigned to axle sanding machine #1774 on October 4, 1989. He initially refused this work, but since he could not be replaced immediately, he remained there until coffee break. He then told his foreman that if he was not assigned other work, he would see his union steward. The foreman then assigned him to axle saw K1032, which pleased him. This was not the first time that he had refused to operate machine #1774. Mr. Guérin was permanently assigned to "light work." He could not work bent over and any repetitive movement of this nature was, in his opinion, a source of danger. He stated that in 1987, after working two weeks on axle sanding machine #1774, he suffered a herniated disc. Since then, he has always refused to operate this machine.

The employer called general foreman Bernard Lemay as a witness. He explained that it would be very costly to modify the sanding machine. This is not worth the effort, since the machine is used only to sand axles. He felt that the machine was functional and could be operated without any danger.

According to wheel shop foreman Alain Rhéaume, 30 to 35 axles are sanded in a normal work day. The operator must manually return the carriage twice for each axle, about 30 seconds each time. On June 29, 1989, following the safety officer's oral decision, he kept the complainant operating the machine. Mr. Rhéaume also indicated that the complainant had not asked to see a physician on June 29.

The employer produced the complainant's medical record, which shows that an initial work accident in 1981 resulted in a herniated lumbar disk and forced the complainant to take a six-month leave to undergo physiotherapy. According to his medical record, the complainant's symptoms did not recur until September 12, 1988, when he suffered a lumbar sprain while lifting a 200-pound metal part. He was then off work until December 12, 1988. During that time, he was hospitalized and underwent physiotherapy and occupational therapy.

The medical record also contained a report on a medical assessment by a neurosurgeon for the Quebec Occupational Health and Safety Commission on March 8, 1989. This report summarizes the development of the complainant's state of health and the treatment he received following his work accidents in 1981 and 1988. Permanent partial disability was established at 11.5% and, in the neurosurgeon's opinion, the complainant had suffered two herniated disks owing to the 1981 and 1988 accidents respectively.

The Board heard the complainant, who explained that his previous back injuries prevent him from performing duties such as manually returning the carriage of sanding machine #1774, which requires repeated bending and flexing back movements. Such duties are a source of danger to him, since they may result in injury. In support of his statements, Mr. Tremblay told how, on June 30, 1989, the day after the officer's decision, while he was still assigned to sanding machine #1774, he experienced back pain and had to take time off. The complainant also testified that he had informed his foreman about his back problems in January 1989.

Transport Canada safety officer Richard Dupuis explained how he had conducted his investigation and commented on the findings in his report.

V

Decision

The Code defines the notion of danger as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

When a safety officer's decision that no danger exists is referred to it, the Board may either confirm the decision of the safety officer or give the instructions that he should or could have given under the circumstances, as prescribed by section 130(1), cited above.

In this case, for the reasons given at pages 3 and 4, the safety officer dismissed the complainant's claim to exercise the right of refusal.

With regard to the first two grounds for the safety officer's decision, the Board concluded, after inspecting the work place and examining the operation of the machine in question, that the safety officer's findings on these points need not be reviewed.

In this regard, the complainant stated before the Board that the operation of the machine constituted a danger per se because of the work posture and movements required to return the carriage manually. The Board attended a demonstration of the operation of the machine and remained unconvinced of the validity of this blanket statement. It is true that the

machine in question seems to show signs of obsolescence and differs in design from machine K1032, which was cited as basis for comparison. These last two points do not suffice, however, to modify the Board's opinion as to the first two grounds for the safety officer's report. The Board thus concludes, based on the evidence at its disposal, that the machine does not constitute a danger per se by reason of its design, handling or operating conditions.

The third ground for the safety officer's decision has to do with the complainant's medical condition, examined in relation to his work as a machinist. His medical record confirms that the complainant has suffered two work accidents while working with his current employer. According to the neurosurgeon's assessment, these work accidents resulted in two herniated disks, leading to permanent partial disability assessed at 11.5%. The complainant claims that his state of health prevents him from operating axle sanding machine #1774 because it constitutes a danger. He believes that this danger entitles him to refuse to work as prescribed by the Code.

In the Board's opinion, the complainant's present state of health as described in his medical record does not warrant the conclusion that operating this particular machine per se, in comparison with the other duties that he is required to perform, may aggravate his condition and thus constitutes a danger within the meaning of the Code.

Maybe the Board could have been able to reconsider this aspect of the safety officer's report if the file had contained a medical certificate indicating work restrictions, or medical evidence or an assessment specifying the type of movements or activities that the complainant could not perform at the time of his refusal, since they

constituted a health hazard, especially since the complainant's present state of health is the direct result of his work activities.

Based on the evidence, however, the Board finds itself in the same position as the safety officer did in rendering his decision. Having concluded that the machine was not defective and could be operated without any obvious hazardous consequences, he had no clear information indicating the type of restrictions, if any, to which Mr. Tremblay's state of health subjected him in the performance of his duties. The fact that Mr. Tremblay had to take time off work after operating this machine does not conclusively settle this issue.

For these reasons, the Board deems that there is no need to review the safety officer's decision in this regard. This ruling by the Board does not establish the principle that medical evidence or an assessment is required to determine whether or not a danger exists. This is a matter that must be specifically assessed depending on the nature and circumstances of each individual case. Similarly, we might find that further evidence might have given the Board a more comprehensive overview of the situation or better information on more technical aspects, but this must not be seen as an invitation to judicialize occupational safety and health matters. This area must not be turned into a ground for disputes. It is appropriate, in this regard, to reiterate the Board's finding in Pierre Guénette (1988), as yet unreported CLRB decision no. 696:

"Health and safety are issues which Parliament has not wanted to subject to the balance of power inherent in collective labour relations. By acting to systematically avoid having such referrals take on the appearance of legal proceedings, the Board helps to ensure that, while respecting the rights of everyone, health and safety remain somewhat above the union-management struggle. This action also ensures that a procedure which was intended to be brief remains so."

While dismissing the application, the Board emphasizes that, according to the evidence, a machinist's work involves a range of duties and activities and is not restricted to the axle sanding machine. Mr. Tremblay has regularly been assigned to many other duties, at the employer's discretion, with no difficulty. The evidence also revealed that the complainant had invoked the right to refuse to work on this machine in March or April 1989. Another worker, André Guérin, did the same thing the day before the hearing. In both cases, the employer agreed to these refusals and assigned both employees to other work stations. In so doing, the employer undoubtedly deemed that, while exercising its management rights, it also complied with the spirit of the general obligation prescribed in section 124 of the Code, that "Every employer shall ensure that the safety and health at work of every person employed by the employer is protected."

Finally, the Board deems it appropriate to refer to section 135(6) of the Code, which deals with the powers of the union-management safety and health committee:

"135.(6) [Powers of committee] A safety and health committee

(a) shall receive, consider and expeditiously dispose of complaints relating to the safety and health of the employees represented by the committee;

...

(d) may establish and promote safety and health programs for the education of the employees represented by the committee;

...

(f) may develop, establish and maintain programs, measures and procedures for the protection or improvement of the safety and health of employees;

(g) shall regularly monitor programs, measures and procedures related to the safety and health of employees;

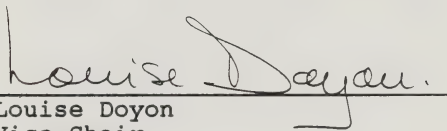
(h) shall ensure that adequate records are kept on work accidents, injuries and health hazards and shall regularly monitor data relating to those accidents, injuries and hazards;

...

(j) may request from an employer such information as the committee considers necessary to identify existing or potential hazards with respect to materials, processes or equipment in the work place; ..."

(emphasis added)

It is therefore my decision, based on the evidence and arguments, to confirm the decision of safety officer Richard Dupuis.


Louise Doyon
Vice-Chair

DATED at Ottawa, this 30th day of November 1989.

information

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SUMMARY

Communications and Electrical Workers of Canada, complainant, and National Mobile Radio Communications Inc., Québec, Quebec, respondent.

Board File: 745-3081

Decision No.: 765

Unfair labour practice complaint against an employer pursuant to sections 50(b), 94(1)(a), 94(3)(a)(i), 94(3)(a)(v) and 94(3)(e) of the Canada Labour Code (Part I - Industrial Relations). Granted in part.

Following the union's certification, the employer resorted to different means aimed at discouraging union activities: employees were transferred, suspended, laid off. Terms of employment were changed. The employer held public as well as private meetings with employees which were tainted with anti-union animus. The employer provided the employees with a form letter to prevent certification.

The allegation made pursuant to section 50(b) was dismissed since the applicant had not complied with section 97(3) of the Code. For the rest, the complaint was upheld.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

RESUME

Le Syndicat des travailleurs et travailleuses en communication et en électricité du Canada, plaignant, et National Mobile Radio Communications Inc., Québec (Québec), intimée.

Dossier du Conseil: 745-3081

No de Décision: 765

Plaintes de pratiques déloyales du travail portées contre un employeur en vertu des dispositions 50b), 94(1)a), 94(3)a)(i), 94(3)a)(v) et 94(3)e) du Code canadien du travail (Partie I - Relations du travail). Accueillies en partie.

Après l'accréditation du syndicat, l'employeur a recouru à différents procédés afin de décourager l'adhésion syndicale: des employés ont été mutés, suspendus, mis à pied. Des conditions de travail ont été modifiées. L'employeur a tenu des rencontres privées et publiques avec les employés empreintes de sentiment antisyndical. L'employeur a fourni aux employés une lettre type pour empêcher l'accréditation.

La plainte invoquant violation de l'alinéa 50b) est rejetée vu que le syndicat ne s'est pas conformé au paragraphe 97(3) du Code. Pour le reste, la plainte est accueillie.



Remedial order issued. Employees who were illegally laid off and who had later resigned will be allowed to return to their positions with compensation. The Board also ordered that its reasons for decision be distributed to each employee. The employer shall also pay to the union the cost of renting a meeting room to enable it to hold up to five union meetings over the next 12 months. The employer shall also reimburse the union the legal fees incurred in the instant proceedings, etc.

Mesures réparatrices ordonnées. Des employés licenciés qui avaient plus tard démissionné auront droit de réintégrer leurs postes, avec dédommagement. Le Conseil a ordonné la distribution de sa décision à chacun des employés. L'employeur devra en outre payer au syndicat les frais de location d'une salle pour la tenue de cinq réunions syndicales dans l'année à venir. L'employeur devra rembourser au syndicat les frais juridiques encourus dans cette plainte, etc.

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Canadien des
Relations du
Travail

Reasons for decision

Communications and Electrical
Workers of Canada,

complainant,

and

National Mobile Radio
Communications Inc.,
Québec, Quebec,

respondent.

Board File: 745-3081

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Mr. Robert Cadieux and Ms. Ginette Gosselin, Members.

Appearances:

Mr. Pierre Grenier, for the complainant union; and
Ms. Diane Girard, for the respondent.

These reasons for decision were written by Ms. Ginette
Gosselin, Member.

I

On November 25, 1988, the Communications and Electrical
Workers of Canada (the union or the CWC) filed a complaint
with the Board, alleging that National Mobile Radio
Communications Inc. (National Mobile or the employer) had
contravened sections 50(b), 94(1)(a), 94(3)(a)(i),
94(3)(a)(v) and 94(3)(e) (formerly sections 148 and 184) of
the Canada Labour Code (Part I - Industrial Relations).

The Board held hearings into this matter in Québec on March
22, 23, 30 and 31, 1989 and April 3, 1989.

II

The complaint

In brief, the union complains that the employer:

- (1) carried on a systematic campaign of harassment and intimidation intended to discourage employees from maintaining their support of the union;
- (2) made all sorts of administrative changes for the purpose of harassing employees;
- (3) on September 10, 1988, wrongfully dismissed Mr. Danny Lachance for union activities;
- (4) on the same day, wrongfully dismissed Mr. Jacques Houle, also for union activities, and somewhat later reinstated him, wrongfully transferring him;
- (5) instigated an anti-union campaign and attempted to set up a company union; and
- (6) wrongfully altered the terms and conditions of employment.

The actions alleged against the employer are generally said to have occurred at a time when the union was certified.

The provisions of the Code that are alleged to have been contravened are the following:

"50. Where notice to bargain collectively has been given under this Part,

...

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege."

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

(v) has made an application or filed a complaint under this Part, or

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union..."

The employer raises various arguments against the complaint, alleging that it is in some respects untimely and in other respects ill-founded in law and is basically not supported by the facts.

III

The evidence

The employer

As its name indicates, National Mobile, a subsidiary of BCE Mobile, operates a radiocommunications business. It sells, installs, maintains and operates radiocommunication systems

such as taxi radio equipment. It is a component of the communications giant that owns Bell Canada.

What is now the Québec branch of National Mobile is the result of a series of sales and mergers of companies: in 1984, Télé Système purchased various companies in the radiocommunications industry in order to merge them. In 1986, BCE Mobile in turn purchased Télé Système. Thus the Québec branch of Télé Système came to be a part of National Mobile, and its employees, who up to then had worked for a small company, found themselves to be within a company operating at the national level.

Approximately one year after this series of changes of employers, the employees of National Mobile began to feel the need for a union. Having decided that promises to improve their working conditions had not been kept, the employees went into action at the end of 1987 and undertook to unionize themselves.

At that point, the Québec branch of National Mobile experienced a slowdown in activities, which in the summer of 1988 was to culminate in the loss of a major customer. Employees feared for their jobs.

The main participants

This case involves a number of employees, some of whom were more active than others. On the union side, firstly, is Mr. Claude Rainville, radio technician and president and founder of the union. A leader of the employees, he initially maintained good relations with management, especially with Claude Guay, who has become vice-president of National Mobile but who was his associate in one of the companies bought out by Télé Système in 1984. Next there

is Josée Tremblay, an office employee and union officer; one of the original activists, Ms. Tremblay was to be almost alone in continuing to support the union in the fall of 1988. Lastly there is Mr. Pierre Langevin, a technician, who also participated in the organization of the union and who was involved in several of the situations denounced by the union.

On the management side, three persons in particular stand out in this case. Firstly, Claude Guay, vice-president of National Mobile for the eastern region. He is very much in evidence in the Québec branch, which he oversees; he is well acquainted with many employees and often deals with them on a personal basis, even though this is not one of his duties. The second is Charles Dagnault, manager of the Québec region, who also knows most of the employees. He is in charge of staff relations at the Québec branch. Lastly, Réjean Poitras also played a major role in this case. A former employee of Télé Système, he was rehired as a part-time technician in May 1988 and was promoted to the position of service manager in July 1988. Before returning to the employer, Mr. Poitras owned among other things a labour relations firm specializing in unaffiliated unions.

Union organizing and certification

At the time this complaint was filed, the CWC had been certified a first time on June 13, 1988 to represent some 40 employees at the Québec branch. That certification was rescinded on the Board's initiative in February 1989. The union was again certified on April 1989 with respect to the following group:

"all employees of National Mobile Radio Communications Inc. working in its Québec branch, excluding maintenance employees, salespersons (advisers), engineers, executive secretary, managers, project and service managers and those above."

Service employees are technicians, installers and ware-housemen. The technicians and installers work on a regular basis. Some work in the garage, installing and repairing equipment on vehicles, while others work in the mobile equipment shop or on "same-day service," and still others are field employees who install, repair and otherwise service radio equipment off the company's premises. In some instances technicians or installers may be assigned on a full-time basis for fairly long periods to specific long-term contracts, such as with a Quebec government department.

Reactions to unionization

The filing of an application for certification was a bombshell for the employer representatives. Their reaction was swift and unambiguous. They questioned the employees regarding their union membership, and starting in January 1988, they made remarks to some employees which the latter considered to be threatening. National Mobile does not want a union.

The atmosphere, which had been relatively peaceful and friendly, became tense. The employees' work and behaviour were monitored more closely, and a new management position was created. It was filled by Mr. Jean-Marie Boucher, an experienced technician already employed by National Mobile.

Transfers, which had previously been infrequent and generally carried out on a voluntary basis, became numerous

during the winter and spring, especially among service employees.

A first series of complaints was filed with the Board in the spring of 1989. A settlement was reached and the complaints were withdrawn.

At the end of May 1988, Réjean Poitras was first hired as temporary journeyman. He had been an installer at Télé Système from 1984 to 1986. At the time of his return as a temporary employee in 1988, Mr. Poitras was the owner of a maintenance business employing some 12 persons and was also a distributor of Amway products. Not long before, he had -
- for health reasons, according to him -- disposed of another business, which specialized in labour relations, and in which he had acted as a consultant to unaffiliated unions.

Two months after being hired as a journeyman, Mr. Poitras obtained, in July, the position of "same-day service" foreman. Created in June by Mr. Dagnault, this management position had first been offered to Mr. Rainville, the then union president, who refused it. A few weeks later, Mr. Poitras was again promoted. He then became service manager, replacing Mr. Boucher, who was ill and unable to continue on in that capacity.

The relations between Mr. Poitras and the other employees were strained. The latter felt that he was surly, authoritarian and lacking in technical knowledge.

On June 13, 1988, the CWC was certified for the first time by the Board. Soon afterward, the local president, Mr. Rainville, was dismissed. He was alleged to have told one of his superiors, who invited him to return to work at

the end of a meal, that he was entitled to one more minute to finish his meal. He was dismissed on the spot. Feeling that this action was exaggerated, he appealed to his former associate, Mr. Guay, who had since become vice-president of National Mobile. They knew each other well. The latter promptly reinstated him in his position.

The sudden transfers continued into the summer. For example, Mr. Rainville learned during his vacation that on his return he would be transferred to a field position. At about the same time, National Mobile learned that a major contract that it had with the Quebec Department of Communications was being lost to a competitor.

All these events -- the meteoric rise of Mr. Poitras, the dismissal and subsequent reinstatement of Mr. Rainville, the many transfers, etc. -- contributed to the maintenance of a tense atmosphere. It was thus in an atmosphere still marked by tension that bargaining commenced on July 13, 1988. The union tabled its demands. The president, Mr. Rainville, was on vacation, and it was Ms. Josée Tremblay who took his place on the bargaining committee. A union spokesperson explained the union's demands. Although no wage demands were formally tabled, he informed Messrs. Guay and Dagnault, his management counterparts, that the union would base its wage demands on those of Bell Canada, the parent company. These statements prompted a strong reaction from the employer. Exchanges were limited, and the session ended on that point.

In early August, when he was using an absent office employee's telephone for work purposes, Mr. Rainville was brusquely taken aside by Mr. Poitras and told that he was not allowed to go into the offices. There was then a lively altercation between the two, and as a result Mr. Rainville

was disciplined. However, this matter is not before us as it was not the object of a complaint. The atmosphere became even more tense.

Also in August, management informed the field employees that they would no longer be entitled to the meal expenses that they had been allowed until then. They reacted, citing section 50 of the Code. The employer recognized its error and withdrew its directive.

During the same period, Mr. Guay called in Mr. Langevin to talk with him about his behaviour. At the end of their conversation, Mr. Langevin told Mr. Guay that he was worried about the turn of events since the filing of the application for certification and was discouraged by the deterioration of the work atmosphere. He asked Mr. Guay to convince him that everything would be better without the union. According to Mr. Langevin, there was a "frank" discussion.

At the beginning of September, Mr. Poitras, speaking with a group of employees, basically told them that "if the union comes in, the shop is going to close." For one of them, the message was clear: if they wanted to keep their jobs, the employees had to get rid of the union.

Also in September, Mr. Langevin was on vacation. He took the opportunity to visit National Mobile's facilities in Montréal. There he met with a Mr. Roy, who had formerly been employed at the Québec branch. The latter told him that in Montréal it was rumoured that the hiring and promotions of Mr. Poitras in Québec were linked to the unionization of the employees.

On Friday, September 9, pretexting a lack of work, Mr. Poitras, with Mr. Dagnault's agreement, without delay laid off Mr. Jacques Houle, a technician, and Mr. Danny Lachance, an installer, both of whom were associated with the unionization drive. Never before had National Mobile laid off a permanent employee in Québec. Emotions ran high.

Dismayed and outraged, the union officers, Mr. Rainville and Ms. Tremblay, along with two other employees, did not report for work the following Monday. At the urging of their union representative, they changed their mind and reported in the afternoon. They were then sent home. Suspended, they were unable to return until Wednesday, when the second bargaining session was to be held. In their view, the lay-offs were directly related to the unionization drive. Everyone felt discouraged. Mr. Rainville felt especially responsible for the departure of Mr. Houle and Mr. Lachance. This feeling on his part was in evidence at the bargaining session of September 15.

On the subject of the lay-off of Mr. Houle and Mr. Lachance, neither of the latter was the least senior of the service employees. They were allegedly not offered the opportunity to bump less senior employees because they did not have the same classification. Both had the skills required in order to work elsewhere, particularly as warehousemen. The employer states that it did not offer them such work because it preferred to be able to reinstate them in their original duties when there was again more work.

As a matter of fact, both were recalled effective October 3. The work they were offered consisted in sorting and storing materials in the warehouse and in taking inventory.

Mr. Lachance, after accepting the employer's offer, changed his mind and declined. He officially resigned on September 30.

Mr. Houle, for his part, accepted. He performed the said work for approximately a month and a half. He then performed a variety of tasks in the shop and on the road. A few weeks later, he sought reassurance as to his possibilities of getting back his technician job. Mr. Dagnault instead informed him that since he had the least seniority, "every time there's trouble, you'll be the one to get it." Discouraged, he resigned.

The second bargaining session was held on September 15, after the spontaneous walkout and the suspension of several employees. Mr. Rainville was impatient and discouraged; he felt that something had to give as he could not go on. During the session, he asked for a break and a private meeting with his supervisors, Messrs. Dagnault and Guay. Feeling that he was at the end of his rope, he told them that he was no longer able or willing to look after the union. When the parties returned to the table, bargaining was adjourned until further notice.

Later the same day, he again met privately with his supervisors. He said that he was now ready to "stop the union and set up a company union." According to what could be reconstructed of this conversation, Mr. Rainville asked his supervisors what had to be done in order to get rid of the union. (He did not obtain answers to these questions until some two weeks later.) He also asked that Messrs. Houle and Lachance be reinstated. His supervisors reassured him, saying that they would do all in their power in that regard, "but a little later."

That evening, Mr. Rainville informed his fellow workers that he was stepping down as union president.

With Mr. Rainville stepping down and the bargaining stalled, there was an improvement in the work atmosphere, and this improved atmosphere led to a series of meetings between employees and management. Some such meetings, collective in nature, came to be referred to as meetings of the "renewal committee," regarding which we shall have more to say later; other meetings were individual in nature. We shall examine several of the latter.

The first such individual meeting was between Mr. Guay, vice-president of National Mobile, and Mr. Rainville. Soon after the latter had stepped down as union president, Mr. Guay invited him to a restaurant. He intended to give Mr. Rainville the answers to the questions asked on September 15 on how to get rid of the union. Mr. Guay suggested to him that he send a group letter from the employees informing the union that they no longer wanted to be represented. He even gave him a form letter and a piece of paper bearing the address of the union and the QFL. At the same meeting, Mr. Guay gave the impression that unionization of the employees was posing a serious threat to the very existence of the Québec branch. Mr. Rainville listened. He took the form letter and the address, but he did not act on his supervisor's invitation.

The second meeting was held between Mr. Guay and Ms. Tremblay on October 4. At the time, Ms. Tremblay was still a union representative and negotiator. That evening, Mr. Guay accompanied a group of employees to a bar. In an aside, Mr. Guay repeated to Ms. Tremblay what he had already told Mr. Rainville at the beginning of the year: "my

supervisors told me that it might cost millions but there would be no union."

A third meeting took place in mid-November. It was between Mr. Guay and Mr. Langevin, the technician mentioned above. On the day in question, Mr. Guay called Mr. Langevin into his office. The two men chatted about Mr. Langevin's personal problems. Then they went to the restaurant. There the discussion turned to the union. Mr. Guay confided to Mr. Langevin that there was no point, that National Mobile would not sign an agreement, that it could not do so. He added that the employees would therefore find themselves on "June 13, 1989" without a union. (June 13, 1989 is the date on which, according to section 38 of the Code, revocation could be sought.)

Pierre Langevin states that he came out of that meeting convinced that there was no longer a need for a union. The next day, he went to see Mr. Dagnault, the general manager, to inform him that he was withdrawing his support for the union. He requested the latter's assistance. Soon afterward, he again met with Mr. Guay. In answer to a question asked by the latter, he assured Mr. Guay that if a petition were circulated to get rid of the union, he would sign it; he later did so. (An event subsequent to the filing of the complaint led Mr. Langevin to change his mind and once more give his support to the union.)

As we have already noted, parallel to these individual meetings, management and employees were meeting as a group in what was later referred to as the "renewal committee." Mr. Dagnault, regional manager, and Mr. Rainville, ex-president of the union, both claim to be the instigator of that committee.

Mr. Dagnault's stated objective was to make himself available to the employees and talk with them about their problems at work. A few days from the time when Mr. Langevin was advised on how to get rid of the union, on about September 20, Mr. Dagnault began to make himself "available" to meet with employees; such meetings were to take place in his office on Wednesday evenings, after work.

As regards Claude Rainville, his stated objective was to boost the company and re-establish a favourable atmosphere. The employees were to meet after work. Nearly everyone was invited. However, according to Mr. Rainville, initially he would have preferred to exclude Ms. Tremblay, because she had maintained her contacts with the union representative. These meetings were held on Monday evenings after work, in the company cafeteria. The first took place on September 19.

After two weeks of operating separately, the Dagnault and Langevin groups merged. Supervisors Guay and Dagnault then took an active part in these meetings. Some ten such meetings were held, five of which are attested to by minutes. There was discussion of working conditions, in particular the reinstatement of Messrs. Houle and Lachance with a wage increase. When questioned by the employees who wanted to see their colleagues reinstated, Mr. Guay and Mr. Dagnault stated that they were powerless, since they could not, they said, alter the working conditions because of the collective bargaining with the union.

These meetings between management and employees were always held in the evening, after work. Anyone could attend, although employees were not paid to do so. The meetings were held over a period of approximately two months.

On November 25, the union, informed of these events, filed the instant complaint. At the same time it arranged to hold a bargaining session with the employer on November 28. On that occasion, the union, represented by Ms. Tremblay, who was the only employee to persist openly, officially informed the employer of the filing of its complaint. Still the negotiations were at a standstill. The same day, Mr. Dagnault informed the employees that he was terminating the renewal committee.

A few days later, on December 7, the Board received a petition dated November 30. Several employees of National Mobile indicated that they were withdrawing their support for the union. The said document was signed on the work premises.

This, then, is the evidence.

IV

Arguments

Both employer and union recognize that the atmosphere at the Québec branch became very tense after the application for certification was filed. The employer, while acknowledging that the news shocked and alarmed it, attributes the deterioration in the atmosphere to the employees, alleging that they became lazy and made every effort to slow down the work. Thus in its view, the objectives of sound management justify the measures taken with respect to the employees.

According to the union, the deterioration of the work atmosphere is attributable to the employer and is tainted with anti-union animus. Employer representatives became irritable and punctilious; they exercised greater supervision and increased their arbitrary actions and

disciplinary measures. They transferred employees and laid them off as never before; all this was done, according to the union, in order to bring the employees to abandon the idea of unionization.

V

Decision

In the case of complaints alleging violation of section 94(3) of the Code, section 98(4) imposes the burden of proof on the employer:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Furthermore, section 97(2) provides that:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

Lastly, section 97(3) provides that:

"97.(3) Except with the consent in writing of the Minister, no complaint shall be made to the Board under subsection (1) in respect of an alleged failure to comply with section 50 or paragraph 94(3)(g) or 95(a) or (b)."

(A) Regarding violation of section 50(b)

The union produced several pieces of evidence to the effect that section 50(b), dealing with a statutory freeze on terms and conditions of employment, had been contravened. For our

purposes, we have retained the allegation that a change in policies on meal expenses contravened that provision. The casual manner in which the employer acted is indeed rather disturbing.

However, according to section 97(3), the Board can legitimately hear such an allegation under section 50(b) only with the consent of the Minister of Labour. No such consent was given or even sought in the present case. For this reason alone, we cannot accept this allegation, which is therefore dismissed (see Canadian Imperial Bank of Commerce (Creston and St. Catharines) (1979), 35 di 105; [1980] 1 Can LRBR 307; and 80 CLLC 16,002 (CLRB no. 202)).

(B) Regarding violation of sections 94(1) and 94(3)

Only those events occurring in the 90 days preceding the complaint may be taken into account in our decision. In the present case, the repeated contravention of the above provisions is blatant. Whether or not a distinction is made between the evidence required under sections 94(1) and 94(3), there is no doubt that both were contravened on a regular basis by National Mobile and its most senior managers during the entire period in question.

When the employer, through its highest-ranking representatives, took offence and rose up against the very presence of the union and repeated that the company would never agree to it, it plainly showed the extent of its anti-union animus. In this, the requirement under section 94(3)(a) et seq. was met (see Iberia Airlines of Spain (1987), 68 di 133 (CLRB no. 608); and Overland Express, Division of TNT Canada Inc. (1987), 70 di 79 (CLRB no. 631)). Furthermore this glaring evidence has in no way been contradicted.

When the employer, for months, regularly sought to undermine the union's actions and direct the employees toward other choices, in particular by encouraging them to withdraw their support for it and by giving them the support and advice for doing so, it also violated section 94(1). (See Fort Alexander Indian Band et al. (1984), 56 di 43 (CLRB no. 462); Bank of Montreal (Place Bell Canada Branch, Ottawa) (1985), 62 di 154 (CLRB no. 530); and Can-Coast Marine Inc. (1987), 68 di 165 (CLRB no. 610).)

National Mobile deliberately met with employees for the purpose of discouraging them from any union ties, and it literally harassed some who were identified with the union. Whether in terms of the September meeting with Mr. Rainville or the October and November meetings with Ms. Tremblay and Mr. Langevin, the uncontradicted evidence clearly shows contempt for the employees, their rights and the law. In each case employees were given to understand that unionization would be detrimental to them. Furthermore they were invited to get rid of the union for their own good. They were even given the means to do so. Concurrently with these pressures, an effort was made to make sure that there were living examples to remind the employees that the employer's anti-unionism was in earnest.

Hence the lay-off of Messrs. Houle and Lachance, the explanation for which was a lack of work. But in view of the suddenness of the action, National Mobile's inability to justify it in rational terms and the sudden recall under dubious circumstances, we are convinced that the two employees' union affiliation played a role in their lay-off. The latter action was also one more move to break the spirit of the other employees. The strategy, moreover, was successful: Mr. Rainville, subjected to rough treatment for some months, was broken down, and the tide of opinion

began to turn against the union. The recall of the two employees to precarious jobs contradicted the employer's own statements and was part of the campaign of intimidation conducted against the employees. The fact that Messrs. Houle and Lachance subsequently resigned also figures in the unfair practice of which they were victims. Our understanding of the evidence leads us to conclude that if they had not been wrongfully dismissed and then recalled to precarious jobs, they would not have resigned. Their lay-off and all that followed contravened the Code.

It is almost redundant to say that the evidence also clearly shows the campaign conducted by National Mobile to induce the very union officers, namely Mr. Rainville and Ms. Tremblay, to abandon the union ship. If we confine ourselves to the events of September and subsequent months, the private meetings with Mr. Guay and the unambiguous statements that he made had only one message: drop the union. Such efforts to bring these persons to abandon their union activities contravened both sections 94(1)(a) and 94(3)(e) of the Code.

The renewal committee is part of this pattern and arises from the same anti-union intent. Here, National Mobile underhandedly sought to show the employees that they could solve their work problems without resorting to a union. When they could not, it was because of the freeze in terms and conditions of employment necessitated by the presence of the union! In this regard, the petition subsequently sent to the Board is significant: the persons who signed it stated that they hoped to solve their problems without an intermediary.

Without having admitted these facts or offered evidence as to what may have transpired in the individual or collective meetings described above, counsel for National Mobile nevertheless argues that the said meetings could in some way be protected by section 2 of the Canadian Charter of Rights and Freedoms regarding freedom of expression. Without it being necessary to elaborate, the Board feels that such is not the case. The parameters of that protection were explained by the Board in Bank of Montreal (Bank and Cecil Streets Branch, Ottawa) (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRB no. 518); and American Airlines Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301). And the actions of National Mobile management in no way meet these requirements. Everything that happened in the said meetings shows a pernicious desire to undermine the employees' legitimate union activity. Such an undertaking is no more protected by the Charter than by the Code. Furthermore, National Mobile cannot deny all allegations and at the same time claim to have acted under some form of immunity. There again, National Mobile regularly contravened sections 94(1) and 94(3)(e) of the Code.

VI

Conclusions and remedies

The present complaint is well founded. In such cases, section 99 provides that:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), (c) or (f), by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,

(ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, and

(iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by the failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer;

(d) in respect of a failure to comply with paragraph 94(3)(e), by order, require an employer to rescind any action taken in respect of and pay compensation to any employee affected by the failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer;

...

(2) For the purposes of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of these objectives."

In its complaint, the union concluded by calling for the following specific remedies:

"Order the Employer to grant the representative of the Union access to the work place, allowing him to meet with the employees and hold meetings on the work premises during working hours;

Allow the Union to set up a notice board on the premises of the Employer at the latter's expense;

Order the Employer to pay the Union, for the period extending from the granting of certification to the conclusion of a collective agreement, such union dues as are established by the Union;

Declare that National Mobile Radio Communications Inc. contravened the provisions of the Canada Labour Code and **order** it to distribute to each of its employees a copy of the decision concerning the present complaint;

Order that Messrs. Danny Lachance and Jacques Houle be reinstated in their positions with all their rights and privileges and that as compensation they be paid the equivalent of the salary and other benefits of which they were deprived by reason of their dismissal and/or transfer;

Order the Employer to reimburse the Union for all recruitment and union organizing expenses incurred by it from the commencement of its actions to the date of the present order;

Lastly, order the Employer to pay the Union all expenses incurred by the latter in preparing for collective bargaining and for the actions taken within the framework of such collective bargaining."

(translation)

All things considered, the Board for its part finds, particularly in view of section 99(2), that in the circumstances the following measures are fair and are required in order to try to remedy the adverse consequences of all these contraventions.

1. The Board declares that National Mobile and its managers, Messrs. Claude Guay and Charles Dagnault as well as Réjean Poitras, have contravened sections 94(1) and 94(3) of the Canada Labour Code (Part I - Industrial Relations), and they are ordered to cease immediately to contravene the said provisions and comply with them.
2. The Board declares that the lay-off of Messrs. Danny Lachance and Jacques Houle contravened section 94(3)(a) of the Code. National Mobile is therefore ordered to communicate in writing with said employees within 15 days following receipt hereof, and to offer to reinstate them in the same positions they held prior to

their lay-off on September 9, 1988. In addition, they shall be compensated by National Mobile for the losses that they incurred, in an amount equivalent to the loss of salary since September 9, 1988, established on the basis of the weekly salary that they would have received at National Mobile in the positions they held at the time of their lay-off, augmented by any increase that may have been made to the said salary since that time. They shall also be restored all their rights as if they had never left their employment. Messrs. Lachance and Houle must reply to the employer's offer to reinstate them within 15 days following receipt of the offer in writing ordered herein.

3. In the event that the said offer is rejected by either of the aforementioned employees, National Mobile shall pay them compensation equivalent to the loss of salary incurred between September 9, 1988 and the date of the present decision, calculated in the same manner as above.
4. In the event that either of the employees in question does not respond to the employer's offer within the above time limit, he shall be considered to have rejected it as of the date of the present decision, and the compensation to which he is entitled shall be calculated accordingly.
5. Furthermore, in order to remedy the dissuasive and intimidating effect of the actions taken by National Mobile on its staff as a whole, it is ordered to provide each of its employees covered by the union certification at its Québec branch with a copy of the present decision, to be mailed to his or her residence, within 10 days following receipt.

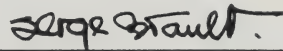
6. National Mobile shall also further provide to the Board, prior to January 5, 1990, under the signature, attested by affidavit, of its regional vice-president, Mr. Guay, a statement that it has carried out the present order. It shall attach the list of all persons to whom it has transmitted the present reasons for decision as well as a copy of the offer of reinstatement sent to Messrs. Lachance and Houle.

These contraventions of the Code, extending over the entire autumn of 1988, resulted in almost total paralysis of any useful union action with respect to the employees. They also caused the union to incur expenses that a unit of its size can hardly take on without compromising its future.

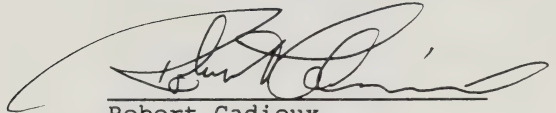
7. National Mobile is therefore ordered to allow the union to set up permanently, at the employer's expense, a notice board on the premises of the Québec branch, for the union's exclusive use for as long as it is certified to represent National Mobile employees.
8. National Mobile is further ordered to reimburse the union for reasonable costs to be incurred in renting facilities for it to hold up to five (5) meetings during the year 1990, for its members employed by National Mobile.
9. National Mobile is ordered to reimburse the union for all reasonable costs incurred for the services of its counsel in the present case.

Lastly, the Board reserves the right to issue a formal order to give effect to the above-mentioned remedies.

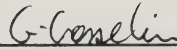
The Board appoints Ms. Debra Robinson, director of its Quebec regional office, or any senior labour relations officer that she may appoint, to assist the parties in implementing the present decision. Any question arising from the implementation of this decision will be a matter for the Board to decide.



Serge Brault
Vice-Chairman



Robert Cadieux
Member of the Board



Ginette Gosselin
Member of the Board

DATED at Ottawa, this 8th day of December 1989.

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SUMMARY

Robert Paquette et al., complainants, and Syndicat des employés de Cablevision-Vidéotron Ltée, Local 2815 of the Canadian Union of Public Employees, respondent, and Vidéotron Ltée, employer.

Board File: 745-3063

Decision No.: 766

This case deals with a complaint of breach of the duty of fair representation (section 37 of the Canada Labour Code - Part I) filed by nine complainants against the union for not proceeding with their grievance. Complaint dismissed.

The Board concluded that the union's decision not to proceed with the grievance did not constitute a breach of its duty of fair representation, because that decision was not made in an arbitrary and discriminatory fashion nor was it tainted with bad faith. In fact, the decision resulted from an examination by the union and the appropriate authorities of the merits of the complainants' claims and of the chances of success of their grievance at arbitration.

RESUME

Robert Paquette et autres, plaignants, et Syndicat des employés de Cablevision-Vidéotron Ltée, section locale 2815 du Syndicat canadien de la fonction publique, intimé, et Vidéotron Ltée, Montréal (Québec), employeur.

Dossier du Conseil: 745-3063

N° de décision: 766

Plainte de violation du devoir de représentation juste (article 37 du Code canadien du travail - Partie I) faisant suite à l'abandon, par le syndicat, du traitement d'un grief présenté par neuf plaignants. Plainte rejetée.

Le Conseil a jugé qu'en décidant d'abandonner le recours des plaignants, le syndicat n'avait pas manqué à son devoir de juste représentation puisque cette décision n'était pas empreinte de mauvaise foi, ni animée d'un sentiment discriminatoire ni arbitraire. La décision du syndicat résultait effectivement d'une analyse, par ce dernier et les instances appropriées, du bien-fondé des prétentions des plaignants et des chances de succès de leur grief à l'arbitrage.



According to the Board, the fact that the union had failed to reveal to its constituents the underlying strategic dimension of its decision is irrelevant in this case. Insofar as the evidence does not reveal that the strategy adopted by the union with respect to labour relations matters has undermined the rights of the complainants, this is not an element that must be considered for the purposes of the Code.

Decisions followed: André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); and Jean-Guy Bellegarde (1981), 45 di 292; and [1982] 3 Can LRBR 378 (CLRB no. 343); Claude Paquet (1985), 59 di 149; and 85 CLLC 16,053 (CLRB no. 496); Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304).

Selon le Conseil, le fait que le syndicat a manqué de transparence avec ses commettants en ne leur révélant pas la dimension stratégique sous-jacente à sa décision n'a pas d'incidence en l'espèce. Dans la mesure où la preuve ne révèle pas qu'une stratégie adoptée par un syndicat dans un contexte de relations du travail a porté atteinte aux droits des plaignants, il ne s'agit pas d'un élément pertinent à l'application du Code.

Décisions suivies: André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; et 81 CLLC 16,108 (CCRT n° 319); et Jean-Guy Bellegarde (1981), 45 di 292; et [1982] 3 Can LRBR 378 (CCRT n° 343); Claude Paquet (1985), 59 di 149; et 85 CLLC 16,053 (CCRT n° 496); Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; et 81 CLLC 16,096 (CCRT n° 304).

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| Canada |
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| Canadien des |
| Relations du |
| Travail |

Reasons for decision

Robert Paquette,
Raymond Normandeau,
Jean-François Maltais,
Christian Lemieux,
Jacques Laurin,
Normand Lalonde,
Diane Fortin,
Jean-Claude Coulombe and
Clément Doucet,

complainants,

the Syndicat des employés de
Cablevision-Vidéotron Ltée,
Local 2815 of the Canadian Union
of Public Employees,

respondent union,

and

Vidéotron Ltée,

employer.

Board File: 745-3063

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members.

Appearances:

Mr. Robert Paquette, on his own behalf and on behalf of the
other complainants;

Mr. Gilles Mathieu, for the union; and

Mr. Luc Beaulieu, for the employer.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

This case deals with a complaint filed pursuant to section
37 of the Canada Labour Code (Part I - Industrial Relations)
by Mr. Clément Doucet on behalf of nine workers, including
himself (the complainants), against the Syndicat des
employés de Cablevision-Vidéotron Ltée, Local 2815 of CUPE

(the union). The employer, Vidéotron Ltée, was mis-en-cause.

This decision follows a hearing held in Montréal on November 28, 1989.

Section 37 of the Canada Labour Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

II

The Facts

The complainants are employed as network planning analysts by Vidéotron Ltée, a cable television company. They are covered by the union certification and the collective agreement entered into by the union and the above-mentioned employer.

In the fall of 1985, the employer changed the complainants' duties in a manner they considered fundamental. Their collective agreement provides that, depending on the circumstances, they may request a re-evaluation of their duties and wage scale ranking. A witness testified that the changes essentially involved assigning to each complainant part of the area served by Vidéotron Ltée. When a problem within their area of expertise arose and there was no need to refer it to their supervisor, it was directed to the appropriate employee, who essentially dealt with it in the same way as before.

When the changes were made, the complainants notified their local union representatives and claimed that a re-evaluation of their duties and wage scale ranking was warranted. In accordance with the collective agreement, the union and the employer set up an evaluation committee comprised of an equal number of representatives from each side in order to resolve such issues. If a dispute arises, a grievance may be filed and eventually referred to arbitration.

The complainants and their union representatives had several meetings. As a result of the changes affecting the complainants, the union and the employer rated the positions. The union concluded that a re-evaluation was warranted; the employer concluded that it was not necessary.

That was the situation as of January 1988. During subsequent meetings with the union, the employer maintained that the complainants' grievance was ill-founded and the changes in their duties did not warrant a reclassification. The complainants had no option but to request arbitration.

In early 1988, representatives of the evaluation and executive committees of the union local met with Serge Perreault, a union representative with the Canadian Union of Public Employees specialized in job evaluations. Mr. Perreault reviewed the complainants' case and the union evaluation committee's findings. He concluded that it would be futile to refer the grievance to arbitration and recommended that said grievance be abandoned. However, in response to a suggestion by the union local, Mr. Perreault said the union could submit a request for arbitration for strategic purposes in the hope that the employer might concede during the grievance process. He felt that a request for arbitration was futile, and was seeking to obtain an informal settlement.

It was for that reason alone, according to undisputed testimony, that the union filed a request for arbitration without consulting the complainants. The first hearing was scheduled for the summer of 1988, but it was postponed for reasons unrelated to the case.

In the fall of 1988, the complainants insisted that a new arbitration hearing be scheduled. They consulted with several local union officers. One of those officers, Charles Raymond, told them that arbitration of their grievance was out of the question. He went on to say that in a memorandum of understanding dating back to 1985 between the employer and the union, the union agreed not to request arbitration with respect to the re-evaluation of the position of "network planning analyst (project leader)." The complainants reacted angrily. They met later with the union evaluation committee. During a turbulent meeting, the role of the 1985 memorandum of understanding was clarified. It had been signed before the alleged changes to the complainants' positions; in addition, it related to a different classification, despite the apparent similarity to that of the complainants. In light of these facts, it was acknowledged by both parties that the 1985 memorandum of understanding was not relevant to the discussion. It would appear that Mr. Raymond spoke too soon. During this meeting, which was marred by expressions of hostility, the complainants were told that, irrespective of the existence of the 1985 memorandum, the evaluation committee felt that their grievance, filed for strategic purposes, was without merit and would be withdrawn. This was done, hence the complaint.

III

The Arguments of the Parties

The complainants' allegation of breach of section 37 stemmed essentially from the fact that the grievance was abandoned as a result of the 1985 memorandum of understanding. They submitted that the memorandum was totally unrelated to their case and did not justify the decision not to proceed with a grievance, which had implications for their advancement in the company and the improvement of their working conditions. They were of the opinion that the union had not dealt seriously with their case and that the decision not to proceed with their grievance constituted an arbitrary measure contrary to section 37 of the Code.

The union acknowledged that its handling of the complainants' case may not have been perfect, but it maintained that the decision not to proceed with the grievance was made in the spring of 1988 and was totally unrelated to the 1985 memorandum. Furthermore, they argued that the assessment carried out by their evaluation committee and the expert in such matters indicated that the grievance had no chance of success at arbitration, and the union decided to abandon it for that reason alone.

In his submissions, counsel for the employer said that one of the labour relations tactics available to both the union and the employer is the filing of a request for arbitration even when there is little chance of success and no actual intention to go through the arbitration process.

IV

The Decision

The Board has time and time again defined the union's duty of representation under section 37 of the Code (see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); and Jean-Guy Bellegarde (1981), 45 di 292; and [1982] 3 Can LRBR 378 (CLRB no. 343)). A union's duty of representation does not include the obligation to proceed with all grievances that its members may wish to bring before an arbitrator (see André Cloutier, supra). What a union must not do is to refuse to file a grievance, when it is entitled to do so, or to refuse to file a request for arbitration at the expense of one of its constituents, in a manner that is arbitrary or discriminatory. A union may make a mistake, but it must not act in a fraudulent or discriminatory manner (see Claude Paquet (1985), 59 di 149; and 85 CLLC 16,053 (CLRB no. 496); and Brenda Haley, supra).

In this case, the undisputed evidence shows that the union determined that the complainants' grievance was without merit even before the first request for arbitration was filed. The evidence also shows that the union met with the complainants, listened carefully to their arguments, assessed them on their merits, and consulted a union expert in such matters. This expert, whose credibility has not been disputed, recommended that the union local not proceed with arbitration, but admitted that it could do so strictly for strategic reasons in the hope that it might obtain an informal settlement before arbitration. The employer's firm and unwavering stand eliminated this possibility. In the fall of 1988, the union had to decide whether to go to

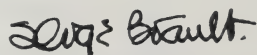
arbitration with a grievance that it knew was without merit or to proceed no further. It chose the latter option.

The evidence shows that, after some hesitation, the union local realized that the 1985 memorandum had no bearing on this case and did not take it into account in its dealings with the complainants. One of the complainants testified that during their last meeting with the evaluation committee, they were informed of the union expert's negative assessment and that there was no reason for the union to take the case to arbitration.

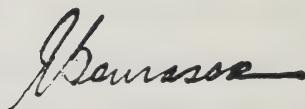
A review of the entire body of evidence revealed the real problem in this case: the union was not totally candid with its members. The Board was told, without much conviction, that if the nine complainants had been informed of the union's strategy, the risk of a leak would have been too great and the employer would have learned of it, eliminating all chance of a settlement. It is not the Board's role to pass judgment on this type of attitude, which appears to be related more to the parties' conception of labour relations than to the application of the Code. The members of the union's evaluation and executive committees were aware of the situation; it is not easy to see how the risk of a leak was less at that level.

This having been said, the evidence does not demonstrate that the union's strategy constitutes a violation of the complainants' right to fair representation by their union. On the contrary, it shows that the union strategy did not adversely affect the complainants' rights and that it was the lack of intrinsic merit in their claims that led to the adoption of that strategy. There was nothing illegal in that.

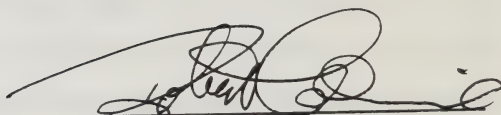
As the evidence shows that the decision to abandon the complainants' grievance resulted from an examination by the union and its appropriate authorities of the merits of the grievance and that this decision was not made in an arbitrary or discriminatory fashion and was not tainted with bad faith, the complaint is dismissed.



Serge Brault
Vice-Chairman



Evelyn Bourassa
Member of the Board



Robert Cadieux
Member of the Board

DATED at Ottawa, this 12th day of December 1989.

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Summary

PAUL R. GILLIS, DAVID GLENNIE AND
PAUL RICHARDSON, COMPLAINANTS, AND
CANADIAN UNION OF POSTAL WORKERS,
RESPONDENT UNION.

Board File: 745-3399

Decision No.: 773

Three members and officers of the Canadian Union of Postal Workers who allegedly remained active in the Letter Carriers Union of Canada after CUPW won the right to represent both "inside" and "outside" employees of Canada Post Corporation were disciplined by CUPW for retaining this allegiance to LCUC.

They filed complaints with the Board alleging that CUPW had violated certain provisions of the Canada Labour Code (Part I - Industrial Relations).

The Board decided that they could not complain to the Board concerning the discipline imposed without first exhausting CUPW's internal appeal procedure.

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Les motifs de décision seulement
peuvent être utilisés aux fins
légales.

Résumé de Décision

PAUL R. GILLIS, DAVID GLENNIE ET
PAUL RICHARDSON, PLAIGNANTS, ET LE
SYNDICAT DES POSTIERS DU CANADA,
SYNDICAT INTIME.

Dossier du Conseil: 745-3399

No de Décision: 773

Le Syndicat des postiers du Canada (SPC) a imposé des mesures disciplinaires à trois membres et dirigeants parce que ces derniers seraient restés membres actifs de l'Union des facteurs du Canada après que le SPC eut obtenu le droit de représenter les postiers et les facteurs de la Société canadienne des postes.

Les plaignants ont présenté une plainte devant le Conseil alléguant violation de certaines dispositions du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a conclu que les plaignants ne pouvaient déposer de plainte concernant les mesures disciplinaires imposées sans avoir d'abord épuisé tous les recours de la procédure d'appel du SPC.

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Reasons for decision

Paul R. Gillis,
David Glennie and
Paul Richardson,

complainants,

and

Canadian Union of
Postal Workers,

respondent union.

Board File: 745-3399

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Victor E. Gannon and Michael Eayrs.

These reasons for decision were written by Vice-Chairman Eberlee.

Appearances:

James Shields and Francine Roach, for the complainants, Messrs. Gillis, Glennie and Richardson; and Gaston Nadeau for the Canadian Union of Postal Workers.

I

The issue here is whether, at this time, Messrs. Gillis, Glennie and Richardson may complain to the Board against discipline imposed upon them by the Canadian Union of Postal Workers (C.U.P.W.) without first exhausting the union's internal appeal procedure. At a hearing in Halifax on December 6, 1989, the Board decided and ruled orally that they cannot so complain at this stage. These reasons confirm and elaborate on the Board's decision.

II

Paul R. Gillis, David Glennie and Paul Richardson are employees of Canada Post Corporation in Halifax, Nova Scotia. Until earlier this year, they worked in a bargaining unit that was represented by the Letter Carriers Union of Canada. This bargaining unit and the so-called "inside unit", represented by C.U.P.W., were merged by decision of the C.L.R.B. In a representation vote held at the beginning of 1989, C.U.P.W. won out over L.C.U.C. and on February 1, 1989 was declared by the C.L.R.B. to be the bargaining agent for the new merged and over-all unit. The Letter Carriers' Union no longer represented employees of Canada Post Corporation, although it continued its existence as a union organization.

Messrs. Gillis, Glennie and Richardson joined C.U.P.W. and in the late spring of 1989 were each elected to full-time positions on the regional executive of C.U.P.W. It is not disputed that they also retained their membership in the L.C.U.C. Mr. Gillis is said to have been the treasurer of the Dartmouth local of L.C.U.C. and Mr. Glennie its president at this time.

During the summer of 1989, C.U.P.W. came to perceive the continuing L.C.U.C. organization as a challenge and the participation of any member or officer of C.U.P.W. in the activities of L.C.U.C. as a conflict of interest. A resolution was passed by the National Executive Board of C.U.P.W. on August 1, 1989 requiring any officer of C.U.P.W. to drop his or her membership in L.C.U.C. and any member of C.U.P.W. to resign any office held in L.C.U.C. It also warned that any member of C.U.P.W. "who supports, advises or encourages the L.C.U.C. or works with L.C.U.C. in its activities against C.U.P.W. will be subject to charges under article 8 of the National Constitution."

Messrs. Gillis, Glennie and Richardson were then notified by way of a general circular letter addressed to all members of the union holding a national or regional position in C.U.P.W., of the existence of this resolution. The circular letter, which was signed by C.U.P.W. President J.C. Parrot advised them to resign from their positions in L.C.U.C. and from membership in that union if they were in "this situation of conflict".

The three complainants replied in writing that membership in L.C.U.C. did not place them in a conflict of interest, that the requirement they give up that membership was "unreasonable" and that they would not relinquish it. The result was that they were temporarily suspended from C.U.P.W. office. Charges were brought against them by C.U.P.W.'s First National Vice-President and authorized by the National Executive Board. They were accused of "having committed a violation of section 8.01 of the National Constitution by maintaining membership in a rival organization while holding office in the C.U.P.W., despite the request of the N.E.B. to take themselves out of this obvious conflict of interest and, by keeping themselves in that situation, they acted dishonestly against the Union. In so doing, they acted in opposition to a collective action of the Union and their conduct was detrimental to the welfare and interests of the Union and the membership."

The charges were heard by the Atlantic Region Disciplinary Committee on September 6, 1989 in Halifax. On October 11, 1989, this committee issued a decision in which it found the three guilty as charged. By way of penalty, the committee withdrew from them the right to hold any office and suspended them from membership in C.U.P.W., both for a period of two years. This has not interfered with their

employment by Canada Post. They have lost their paid full-time positions in C.U.P.W. but have returned to the duties of letter carriers in the Halifax area.

Messrs. Gillis, Glennie and Richardson complained to the Board on October 20, 1989 against C.U.P.W.'s action. Specifically, they alleged that C.U.P.W. had violated certain provisions of the Canada Labour Code (Part I - Industrial Relations) in the following ways:

- Section 95(f) by suspending an employee from membership in C.U.P.W. "by applying to the employee in a discriminatory manner the membership rules of the trade union";
- Section 95(g) by taking disciplinary action against and imposing a form of penalty by applying in a discriminatory manner the standards of discipline of the trade union;
- Section 95(h) by suspending them from membership and taking disciplinary action or imposing a penalty by reason of their "having refused to perform an act that is contrary to Part I of the Canada Labour Code"; and
- Section 96 by seeking "by intimidation and/or coercion" to compel them to cease to be members of the L.C.U.C.

The relevant sections of the Code alleged to have been breached by C.U.P.W. read as follows:

"95. No trade union or person acting on behalf of a trade union shall
...

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a

discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;

(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of that employee having refused to perform an act that is contrary to this Part; or

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

The National Executive Board of C.U.P.W., which was the plaintiff in the disciplinary case against Messrs. Gillis, Glennie and Richardson, gave notice at approximately the same time that it intended to appeal against the Atlantic Regional Disciplinary Committee decision. The Board was told that the appeal was directed at the penalty imposed.

It was not until December 2, 1989, that Messrs. Gillis, Glennie and Richardson filed their appeal against this decision. As of December 6, 1989, it had of course not been heard and decided by the National Appeal Board, the body which would deal with it, in accordance with the C.U.P.W. constitution.

The Board was told that the National Appeal Board, under the terms of amendments made to the C.U.P.W. constitution early in 1989, has been established to replace the National Executive Board as the body to which an appeal against union disciplinary action may be taken as a last resort. The National Appeal Board consists of eight members and an equal number of alternates. These are elected by the C.U.P.W. convention; two members and two alternates are elected from each region and they must all come from different locals. The ninth member acts as chairperson and is appointed by the National Executive Board. None of the

members may hold any position as national officer, regional officer or union representative. The Appeal Board may uphold the decision of the regional disciplinary committee, reverse it or render any other decision it considers appropriate.

III

In dealing with complaints alleging violation of section 95(f) or (g) of the Code, the Board is required to take into account the following provisions of section 97:

"97.(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented his grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.

97.(5) The Board may, on application to it by a complainant, hear a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure."

What seems to be at least a partial pre-requisite to the Board's involvement in dealing with a complaint of breach of sections 95(f) or (g) is the existence of an "appeal" of the kind referred to in section 97(4).

The Board does not consider that a proceeding before the Atlantic Regional Disciplinary Committee may properly be characterized as an "appeal" within the meaning of section 97(4) of the Code, although that term was used in the complaint of Messrs. Gillis, Glennie and Richardson to describe what went on before the committee. In the Board's view, the committee was seized with charges that had been levelled against the three men, and went on to deal with those charges at what might be described as the initiating level of the whole process. What was before the Committee was certainly not an appeal from the three men; it was a set of accusations against them by other parties.

An "appeal" within the meaning of section 97(4) only entered the picture when the three appealed on December 2, 1989 to the National Appeal Board against the Atlantic Regional Disciplinary Committee. That appeal has not yet been dealt with.

The first portion of section 97(4) says, in effect, that a person cannot complain that a union has violated sections 95(f) or (g) of the Code unless the person has presented an appeal "in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access" and that appeal has been dealt with by the union in a "manner unsatisfactory" to the person.

In this instance, there is an "appeal" and there is a

clearly set out "procedure". Nothing in the submissions to the Board suggests in any way that there is not "ready access" to that procedure. The appeal, however, has not yet been heard and thus cannot have been dealt with in a "manner unsatisfactory" to the complainants.

On the basis of the facts before the Board and the clear language of section 97(4), the complainants may not file a complaint in respect of an alleged violation of section 95(f) or (g). However, before making the abrupt jump to that conclusion, the Board is obliged to take into account section 97(5) which pokes some common sense holes through the barrier set up by section 97(4).

Among other things, section 97(5) may be interpreted as saying that even if no appeal has been launched (and thus no internal union procedure has been triggered), the Board may still deal with a section 95(f) or (g) complaint if it believes that the problem cannot wait for internal union mechanisms to operate or if those mechanisms are not readily accessible. In the case before us, there was of course no appeal filed at the time the complaints were filed. The appeal was not filed until December 2, 1989, just four days before the Board's hearing. Perhaps it could be argued that the complainants' appeal, filed at the last minute and well after the appeal of the plaintiff, is simply a technical response to the plaintiff, in the nature of a cross-appeal, and that there was no appeal in existence at the time of the complaint to the Board. Hence, it might be argued, the Board is not barred from exercising its discretion under section 97(5) and may proceed to hear the complaint either on the basis of 97(5)(a) or (b). Such an argument depends over-much upon technicality. But even if the point were accepted, the Board may still use its discretion and not hear the

complaint unless and until internal union processes have been exhausted.

In this instance, the Board believes that any delay in respect of the National Appeal Board hearing and being able to dispose of the appeal is largely attributable to the fact that the complainants at first by-passed the union's own undoubtedly well-known new machinery for dealing with such matters and went straight to the Board. Perhaps they by-passed that machinery because they did not trust it. However, in the Board's view, the machinery deserves to be tested and, if and when it operates in "a manner unsatisfactory" to the complainants, and there is actual ground for making section 95(f) or (g) complaints, such complaints may then be made to the Board. Meanwhile, the Board sees no reason to conclude that the process will be delayed improperly and unfairly.

There is also no ground for concluding that C.U.P.W. has not provided in its constitution for "ready access" to an appeal procedure. Under the C.U.P.W. constitution, there exists, as the next and final step for the complainants, the National Appeal Board whose members (except for the chairman) were elected by the union to serve the appeal process alone.

This is not a situation where the union's formal appeal procedure involves general steps, culminating in a possible determination on the union's national convention floor. We agree completely with what another panel of the Board said in Ronald Wheadon et al (1983), 54 di 134; 84 CLLC 16004; and 5 CLRBR (NS) 192 (CLRB n° 145):

"The Board respectfully disagrees with the position that it is mandatory to exhaust all avenues of internal appeal before coming to the Board. It is unrealistic to suggest that aggrieved persons must follow the complete process which, in some instances could lead to a convention floor at Miami some two years later, as

a prerequisite to access to the protection afforded by the Code. Not only could the expense of such a venture be formidable, the task of then being able to present a meaningful case to the Board after such a delay could be insurmountable."

p. 145

However, this is far from being that kind of situation. The appeal procedure is a one-step proposition; it is apparently ready and available; it should be allowed to run its course.

We do not need to repeat the extensive analysis in respect of the Board's past handling of complaints under sections 95(f) and (g) which is set out in the case of James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRB n° 492). We have relied to a considerable extent upon it in coming to our decision in this case. We note particularly the following:

...

"A general consensus from those decisions is that the role of the Board is not to sit in appeal from internal union decisions, the Board's task is limited to ensuring that discipline standards, which includes the basis for their application, the manner in which they have been applied and the results of their application, are free from discriminatory practices."

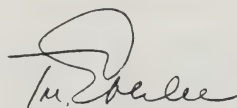
p. 117

In this case, were we to seek to supplant the National Appeal Board at this stage, we could be running counter to the policies which have been established by the Board over time.

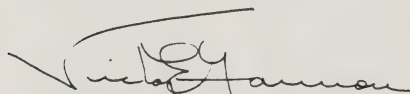
The complaint respecting alleged breaches of sections 95(f) and (g) is dismissed.

The Board has the power under section 16(1) "to adjourn or postpone the proceeding from time to time." We have before us, in the complaint, allegations that sections 95(h) and 96 have been violated, as well as sections 95(f) and (g).

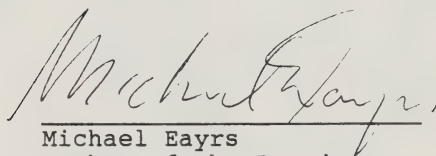
The restrictions of section 97(4) do not apply to them. We consider, however, that it is in the interests of good industrial relations not to deal with them at this time, especially when the complainants' appeals to the National Appeal Board are pending. We therefore have decided to adjourn the hearing and determination of these matters, leaving it to the complainants to advise us in the future if they feel the necessity of our hearing them.



Thomas M. Eberlee
Vice-Chairman



Victor E. Gannon
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 5th day of January, 1990.

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Summary

PUBLIC SERVICE ALLIANCE OF CANADA,
COMPLAINANT, AND METROPOL-BASEFORT
SECURITY GROUP LTD., AND ARIK
GARBER, RESPONDENTS.

Board File: 745-3208

Decision No.: 774

The Board found that the employer had dismissed one employee and reduced another from full-time to part-time status while a union's certification application was under consideration by the Board, for reasons which included "anti-union animus" and which were contrary to certain provisions of the Canada Labour Code (Part I - Industrial Relations). A settlement of the personal claim of relief of the dismissed person was made between the parties, but in the second case the Board ordered the employer to reimburse the employee for lost income while she was on part-time status. The Board did not find that the subsequent dismissal of this employee violated the Code.

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Résumé de Décision

L'ALLIANCE DE LA FONCTION PUBLIQUE
DU CANADA, PLAIGNANT, ET METROPOL-
BASEFORT SECURITY GROUP LTD. ET
ARIK GARBER, INTIMES.

Dossier du Conseil: 745-3208

No de Décision: 774

Le Conseil juge que les mesures prises par l'employeur, c'est-à-dire le congédiement d'une employée et le changement de statut d'une autre de plein temps à temps partiel pendant que le présent Conseil examinait la demande d'accréditation du syndicat, étaient motivées par un sentiment antisyndical et allaient à l'encontre de certaines dispositions du Code canadien du travail (Partie I - Relations du travail). Les parties se sont entendues sur la demande de redressement faite par l'employée congédiée. Dans le cas de l'autre employée, le Conseil ordonne à l'employeur de lui verser une indemnité pour perte de revenus pendant que celle-ci travaillait à temps partiel. Par contre, selon le Conseil, le congédiement ultérieur de cette employée ne contrevenait pas au Code.

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Reasons for decision

Public Service Alliance of
Canada,

complainant,

and

Metropol-Basefort Security Group
Ltd., and Arik Garber,

respondents.

Board File: 745-3208

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Linda M. Parsons and Calvin B. Davis.

The reasons for decision were written by Vice-Chairman
Eberlee.

Appearances:

Philip H. Hunt, for the Public Service Alliance of Canada,
and

James E. Dorsey, for Metropol-Basefort Security Group Ltd.
and Arik Garber.

I

Early in December, 1988, the Public Service Alliance of
Canada (P.S.A.C.) filed an application for certification
as the bargaining agent for a unit of employees of
Metropol-Basefort Security Group Ltd. employed as security
and screening guards at Yellowknife airport. While this
application was under consideration by the Board, the
P.S.A.C. also filed, on February 16, 1989, a complaint that
the employer had violated sections 94(1)(a), 94(3)(a),
94(3)(e) and 96 of the Canada Labour Code (Part I -
Industrial Relations) in various alleged efforts to counter
the union; the union also accused the employer of violating
section 24(4) of the Code by allegedly altering conditions

of employment while the certification application was pending.

The sections of the Code alleged to have been breached read as follows:

"94.(1)(a) No employer or person acting on behalf of an employer shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or
...

94.(3)(a) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

...

94.(3)(e) No employer or person acting on behalf of an employer shall seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

24.(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer or employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right of privilege of such employees until

(a) the application has been withdrawn by the trade union or dismissed by the Board, or

(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board."

A hearing was held in Yellowknife but there was insufficient time for the Board to hear oral argument. By agreement, written argument was exchanged by the parties and presented to the Board during October, 1989.

II

The issues in this case relate to the alleged treatment of certain persons employed by Metropol-Basefort Security Group, Ltd. (Metropol or the employer) to provide security and pre-board screening services at Yellowknife airport. Metropol has contracts at Yellowknife airport with Transport Canada and Canadian Airlines International. It also has contracts to provide security and pre-board screening services at a number of other airports in Western Canada. At some or all of these sites, unions have been certified to represent employees and collective agreements

are in effect.

It is common knowledge that the business in which Metropol is involved can be accurately characterized as highly competitive, even somewhat unstable. Contracts at airports are normally for two or three-year terms; there are invariably a number of firms bidding for them, and often an incumbent contractor is replaced by another whose price is lower. For employees, wages and benefits are scarcely tantalizing. There is exceptionally high staff turnover. When a union is organized and, if it succeeds in obtaining certification and a collective agreement, it risks disappearance whenever the contractor-employer is changed, for there is no apparent means under the Canada Labour Code of continuing its existence vis à vis the new contractor-employer. Employees also face loss of jobs and any benefit accumulations at such a time. It is sadly ironical that persons in the labour force whose need for the protection of collective bargaining institutions is so great should have such abnormal difficulty in holding on to them.

It was against this kind of background that the security and pre-board personnel at Yellowknife airport began signing up with the Public Service Alliance of Canada in October and early November, 1988. Their application to the C.L.R.B. for a certification order was dated November 8, 1988, but it was not actually filed with the Board until December 9, 1988. Notice of the Board's receipt of the application was mailed to the employer on December 14, 1988. It was received in Metropol's office in Edmonton on December 16, 1988. The Board was told, however, that it did not actually come to the attention of a representative of the employer until Saturday, December 17, 1988 and this

person conveyed knowledge of it on December 19, 1988 to Arik Garber, Metropol's northern region client service manager. It is the union's contention that Mr. Garber in fact knew about the union's organizing effort well before the official notification concerning the certification application and the Board is inclined to agree, for reasons we shall come to later.

During the fall of 1988, the Metropol operation at Yellowknife was without a supervisor or manager. The employees appear to have managed themselves and especially their hours of work and over-time. About this time, Mr. Garber was appointed northern region client service manager and he set about attempting to establish a new management order which would include controls on costs, particularly on the cost of over-time work. Early in November, 1988, he engaged Wesley E. Hinchey, a Yellowknife businessman, to act for Metropol in Yellowknife as its part-time manager. He remained as part-time manager until John Evans was appointed site manager on a full-time basis on or about December 20, 1988.

Maggie Lafferty, Pat Sherman and Lynn Lafleur were security and pre-board screening officers. They were active in the effort to establish the union.

Mrs. Lafferty testified that in the late summer of 1988 she asked for and was given permission by the person acting as site manager at the time to take leave from December 21, 1988 until January 12, 1989. Her testimony was unchallenged; the Board has no reason to doubt her. In any case, her presentation and her demeanour indicated to the Board that her testimony was credible.

She made known to Mr. Hinchey, after he became site manager, that her plan to be absent during that period had been approved and he did not demur. Early in December, however, her mother became ill. The doctor decided that her mother required hospital treatment in Edmonton and that since her mother was unable to speak English and would need special personal care, she (Mrs. Lafferty) would have to go with her. Mrs. Lafferty gave Mr. Hinchey a note - a "General Travel Warrant" - from the doctor stating that "it is necessary for Maggie Lafferty to accompany her" to an appointment with a doctor in Edmonton on December 14, 1988.

Mrs. Lafferty told the Board that Mr. Hinchey asked her to return to work on January 12, 1989 but to let him know if she was required to stay away longer.

She arrived in Edmonton on December 13 and her mother was admitted to hospital. She testified that she called Mr. Garber on December 13 from a pay phone in Edmonton and asked him if he had a cheque to cover over-time pay which she was owed. It had been overdue for some time. He told her to phone back on December 16. She told him why she was in Edmonton.

When Mrs. Lafferty called Mr. Garber again on December 16, he told her the cheque was not yet available. According to Mrs. Lafferty, he said to her that he had seen her name on a union paper; he asked her if she had given any authorization to anybody to sign her name, which she denied.

Eventually, Mrs. Lafferty was available again for work. Early in January, she telephoned a co-worker to find out whether she was scheduled for work. This person told her

she was not on the schedule. On January 13, 1989, she talked by telephone to Mr. Evans, the new site manager, who told her he did not know what her situation was. He suggested she telephone Mr. Garber, which she then did. Mr. Garber told her there was no work for her, that she had been absent without authorization and that he would not "fire" anybody else to open up a job for her. She received a letter dated January 27, 1989 and signed by Mr. Evans, giving her notice that her employment was terminated for having been absent from work "without proper authorized leave".

Prior to and just after Mrs. Lafferty's departure for Edmonton in mid-December, Mr. Garber was concerned about establishing a system of work schedules, particularly for the pre-board screening personnel, which would spread the hours of work as evenly as possible between the employees and minimize Metropol's need for, or risk of, the payment of over-time. One approach was outlined to staff in a memorandum from Mr. Garber, dated November 16, 1988. He developed another scheme and communicated it to Mr. Hinchey, the part-time site manager early on the afternoon of December 16, 1988. Mr. Hinchey appears to have issued on December 17, 1988 a letter setting out new rules concerning hours of work and attaching a work schedule for the period of December 19 to 25, 1988. This was superseded by another memo dated December 19 which appears, however, to convey the same information as the December 17 memo, but includes additional work schedules running up to January 15, 1989.

The union asks the Board to find that these changes in schedules, coming as they did around the same time as the company received official notification of the certification

application, constituted alterations in conditions of employment, contrary to section 24(4) of the Code, which we have quoted earlier in these reasons. We have difficulty in upholding this aspect of the union's complaint.

The Board's policy in respect of section 24(4) has been set out clearly in numerous previous decisions. One aspect of it may be summarized along the following lines: a change or alteration per se is not illegal if it is part and parcel of the normal course of doing business - if it fits into a "business as before" context. If the employer, in making an alteration, is doing something in the interests of reasonable business efficiency and effectiveness, which would be done whether or not there was a certification application and which would not alter or adversely affect the potential balance of collective bargaining power between the employer and the union seeking to be certified, then the Board does not consider that section 24(4) has been breached.

The situation here is that Mr. Garber had been struggling for some time to come up with what he considered was a more rational and appropriate system of regulating and scheduling employee's hours of work. He tried one approach and then settled on another, which was implemented coincidentally with the arrival of the notice of the certification application. He may well have been aware of the union organizing campaign much earlier than December 19, the date he gave to the Board, but we are unable to trace any connection between his activities vis à vis the hours of work matter and the certification effort itself. In a general sense, in its application to all employees, the alteration made in working conditions in this instance

does not appear to the Board either to have been designed to, or to have had the effect of, going outside the area defined by past Board policy as being permissible. That is not to say, however, that the implementation of the new approach vis à vis an individual may not have affected that individual in ways contrary to the Code. Which brings us next to Pam Sherman.

As we have indicated, Ms. Sherman was one of the prime movers in the union organizing campaign. She seems to have come to the notice, unfavorably, of Mr. Garber prior to December 19, 1988. The latter told the Board he had concluded from watching her that her performance as a pre-board screening officer was inadequate and she needed training. Mr. Garber went to Yellowknife on December 21. He testified that he talked individually to employees about various job-related matters. He admitted that he also asked them what they knew about the union or what was going on concerning the union. He told the Board that he received a "flood of information" from one person; another said he did not want to discuss the union. Mr. Garber explained that it was "mainly curiosity" which motivated him to question people about the union. He testified that he thought he had had a discussion with Ms. Sherman.

Mr. Garber admitted to having a conversation with pre-board screening officer Robert Giebelhaus. He recalled asking Mr. Giebelhaus what he knew about or what he thought about the union. Mr. Giebelhaus, in his testimony, had more specific recollections of the conversation. He told the Board that he admitted to Mr. Garber that he had signed a union membership application card. When Mr. Garber asked him if Mrs. Lafferty or Ms. Sherman had done so, he did not answer. Mr. Garber said to him that other people who had

tried to unionize the company had lost their contracts; he quoted Mr. Garber as saying that he would appreciate it if Mr. Giebelhaus voted against the union. In his testimony, Mr. Garber denied he talked about how Mr. Giebelhaus should vote.

Mr. Giebelhaus left the employ of Metropol in February, 1988. There is no evidence that he had anything to win or lose from the testimony he provided to the Board. On balance, bearing in mind that both he and Mr. Garber admitted to their having a conversation in which the union was a subject, we are inclined to accept Mr. Giebelhaus' version of the detail of what was said.

That same day, December 21, 1988, Mr. Garber says he observed both Ms. Sherman and Lynn Lafleur at work screening passengers. He decided they were not doing the job correctly and told them they would have to be retrained. Ms. Sherman also went home without authorization between two flights that morning. For this, he reprimanded her verbally because her action was contrary to the instructions which had just been issued concerning hours of work and duty.

Until this time, Ms. Sherman had worked for Metropol on a full-time basis. According to Mr. Garber, as a result of his assessment of her performance, she was reduced to one eight-hour Sunday shift per week on or about December 22, 1988. She continued to work on this part-time basis until April 7, 1989 when she was returned to a full-time basis by the employer until her dismissal around May 6.

Mr. Garber testified that he reduced Ms. Sherman's hours in order to give her time for re-training, but the evidence

shows no effort made by the employer to provide any retraining for her. Instead, she was expected to travel to Edmonton at her own expense (upwards of \$650.00) to spend a day under the tutelage of Mr. Garber. The latter would not give the re-training in Yellowknife.

Mr. Garber had no specific recollection of discussing the union certification matter with Ms. Sherman. On the other hand, she testified that she telephoned him on December 19 to complain about the changes in shift scheduling. She told the Board that he questioned her about her knowledge concerning the union. When she declined to answer, he ordered her to do so; she continued to decline.

On January 18, 1989, John Evans, the site manager, sent Mr. Garber a memorandum, the principal purpose of which seems to have been to convey information about the failure of Lynn Lafleur on a surprise test of his pre-board screening skills carried by a Transport Canada security inspector. The inspector took away Mr. Lafleur's qualification certificate but subsequently allowed him to continue using the metal detecting equipment under proper supervision. The memorandum goes on to say the following:

"Lynn is still heavily involved with this union matter with Maggie and Pat. It has sort of boiled down to those three that are very heavily involved. The rest don't really care that much. The few who were for it before, probably still are now however these three are constantly having meetings etc, between the three. They are planning something. The rest are not involved in these meetings and are not invited.

In view of it all, I would like to rid myself of Lynn and solve a lot of problems and headaches for myself. Right today, I still need him but hopefully I won't next week.

I really think we would be sticking a big knife in this union issue and really cutting them down at least by a third, if we remove Lynn under this Wandering issue."

(sic)

On January 27, 1989, Mr. Evans sent Mrs. Maggie Lafferty her notice of termination of employment and Ms. Sherman the following letter:

*"Metropol Base-Fort Security Group Ltd.
P.O. Box 1917,
Yellowknife, N.W.T..
January 27th, 1989*

*Ms. Pat Sherman
Yellowknife, N.W.T..*

Dear Ms. Sherman;

I have been requested by Metropol Security to advise you that your work skills have been less than satisfactory, you have been already advised of this, and it is therefore felt that you do require further Re-training to upgrade your skills required in order to continue work at the Canadian Airlines Pre-Board Screening Contract in Yellowknife. Until such re-training has been successfully completed by you, we are unable to offer you full time employment at this contract.

It is our Company policy to offer training once to each employee at Company expense in Edmonton. Any employees requiring re-training must do so at their own expense (travel to Edmonton) or wait until such time as an instructor is available and has time to travel to Yellowknife in order to hold a re-training class. At this time it is uncertain when this will be available. We will offer you the opportunity to travel to Edmonton at your expense upon one weeks notice from you.

Please be advised accordingly.

(signed)

*John A. Evans
Manager
Metropol Security Group
Yellowknife"*

III

Based on the evidence, the Board doubts that it was "mainly curiosity" which impelled Mr. Garber to question many of the employees about the union. As we have said earlier, we prefer the versions of the conversations which were reported in testimony by such witnesses as Mrs. Lafferty, Mr. Giebelhaus and Ms. Sherman. These indicate that Metropol's management, in the person of Mr. Garber, wished

to see the union defeated and, by questioning employees about it sought to convey the message that there should be no unionization of the group. Indeed, according to Mr. Giebelhaus, Mr. Garber went farther and attempted to enlist him to oppose the union. Such employer activities are improper and illegal.

The memorandum from Mr. Evans, part of which has been quoted above, indicates clearly that Metropol management saw Mrs. Lafferty, Ms. Sherman and Mr. Lafleur as the ringleaders in the formation of the union and were actively contemplating means of counteracting them.

There is no doubt in the Board's mind that "anti-union animus" was present during at least late December, 1988 and January and February, 1989 and that it was a significant element in motivating the employer to bring about the dismissal of Mrs. Lafferty and to downgrade Ms. Sherman to purely part-time employment. We believe that in the case of the latter, the employer expected Ms. Sherman would sooner or later quit altogether. However, she held on.

Ms. Sherman never did undergo the re-training demanded of her by the company. Instead, not too many weeks after this complaint was filed, in which it was alleged that she had been treated illegally by the employer, and about a month after the Board actually certified the union, she was elevated to full-time employment, which she continued until she was dismissed in May, 1989.

The Board heard considerable evidence concerning events in April and May, 1989 which led directly to the dismissal. The culminating event was on May 1 when Ms. Sherman failed to appear for her shift. The evidence points to the

existence of anti-union animus in the dismissal of Mrs. Lafferty in January, 1989 and the placing of Ms. Sherman on a part-time basis at roughly the same time. It suggests, however, that such was not present by May, 1989 when Ms. Sherman's employment was terminated. In other words, we are convinced that the dismissal was based entirely on reasons other than anything which may be characterized as anti-union animus. In saying that, we are of course not passing any judgment on the justice, or otherwise, of the dismissal. We are merely saying that we cannot find it to be in violation of sections 94 or 96 of the code.

IV


To summarize, the Board does not find the employer in breach of sections 94(1)(a) or 24(4) of the code. But it does conclude that the dismissal of Mrs. Lafferty, and the reduction in Ms. Sherman's employment from full-time to part-time between December 21, 1988 and April 7, 1989 were in breach of sections 94(3)(a), 94(3)(e) and 96 of the Code.

Under section 99, the Board has power to require the contravenor to remedy the industrial relations damage done so as to make whole the party who has suffered such damage.

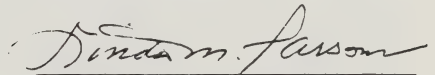
In the case of Mrs. Lafferty, the Board has been advised that her personal claim for relief has already been resolved amicably as between the parties. Thus, the Board will require the employer to provide a remedy only in the case of Ms. Sherman. The Board orders the employer, Metropol-Basefort Security Group Ltd., to pay to Ms.

Sherman an amount of money equivalent to the difference between her earnings as a part-time employee and what she would have been paid as a full-time employee between December 21, 1988 and her resumption of full-time employment on or about April 7, 1989.

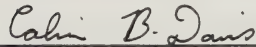
The Board appoints Philip J. Kirkland, regional director and registrar, or a person designated by him, to assist the parties to implement the Board's order. The Board will remain seized of the matter to be able to deal with any problems that may arise in connection therewith and to issue a formal order should the need for such arise.



Thomas M. Eberlee
Vice-Chairman



Linda M. Parsons
Member of the Board



Calvin B. Davis
Member of the Board

ISSUED at Ottawa, this 9th day of January 1990.

information

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Summary

OFFICE AND TECHNICAL EMPLOYEES
UNION, LOCAL 15, ON BEHALF OF
MICHAEL COOPER, COMPLAINANT, AND
EMERY WORLDWIDE, A CF COMPANY,
RESPONDENT.

Board File: 745-3457

Decision No.: 775

These reasons deal with a complaint
by the Office and Technical
Employees Union, Local 15, against
Emery Worldwide, a CF Company, in
which allegations were made that
Michael Cooper had been laid off
contrary to section 94(3)(a)(i) of
the Code:

"94.(3) No employer or person
acting on behalf of an employer
shall

(a) refuse to employ or to
continue to employ or suspend,
transfer, lay off or otherwise
discriminate against any person
with respect to employment, pay or
any other term or condition of
employment or intimidate, threaten
or otherwise discipline any person,
because the person

(i) is or proposes to become, or
seeks to induce any other person
to become, a member, officer or
representative of a trade union or
participates in the promotion,
formation or administration of a
trade union,..."

The Board allowed the complaint and
ordered the employer to reinstate
Michael Cooper in his employment
and to compensate him in the amount
that he would have earned but for
the unlawful lay-off.

Résumé de décision

LA SECTION LOCALE 15 DE L'OFFICE
AND TECHNICAL EMPLOYEES UNION, AU
NOM DE MICHAEL COOPER, PLAIGNANTE,
ET EMERY WORLDWIDE, UNE COMPAGNIE
CF, INTIMEE.

Dossier du Conseil: 745-3457

Décision n°: 775

Les présents motifs portent sur une
plainte déposée par la section
locale 15 de l'Office and Technical
Employees Union, alléguant que
Emery Worldwide, une compagnie CF,
a mis Michael Cooper à pied en
violation du sous-alinéa
94(3)a)(i).

"94.(3) Il est interdit à tout
employeur et à quiconque agit pour
son compte:

a) de refuser d'employer ou de
continuer à employer une personne,
ou encore de la suspendre, muter
ou mettre à pied, ou de faire à son
égard des distinctions injustes en
matière d'emploi, de salaire ou
d'autres conditions d'emploi, de
l'intimider, de la menacer ou de
prendre d'autres mesures discipli-
naires à son encontre pour l'un
ou l'autre des motifs suivants:

(i) elle adhère à un syndicat ou
en est un dirigeant ou représentant
ou se propose de le faire ou de le
devenir, ou incite une autre
personne à le faire ou à le
devenir, ou contribue à la
formation, la promotion ou
l'administration d'un syndicat,..."

Le Conseil accueille la plainte et
ordonne à l'employeur de réintégrer
Michael Cooper dans ses fonctions
et de lui verser une indemnité
équivalente à la somme qu'il aurait
gagnée n'eût été la mise à pied
illégal.

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Relations du
Travail

Reasons for decision

Office and Technical Employees
Union, Local 15, on behalf of
Michael Cooper,

complainant,

and

Emery Worldwide, a CF Company,
respondent.

Board File: 745-3457

The Board was composed of Vice-Chairman Hugh R. Jamieson
and Board Members Victor E. Gannon and Calvin B. Davis.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

Ms. Sandra I. Banister, for the complainant.

Mr. J. David MacKinlay, for the respondent.

I

On December 1, 1989 the Office and Technical Employees
Union Local 15 (the OTEU or the union) filed a complaint
with the Board alleging that Emery Worldwide, a CF Company
(Emery or the employer) had contravened certain provisions
of the Canada Labour Code (Part I - Industrial Relations)
by laying off Michael Cooper because he had exercised his
rights under the Code. More specifically, these rights
included his joining the union on or about July 22, 1989
and actively campaigning amongst his co-workers to
persuade them to join the union and to have the OTEU
represent them for the purposes of collective bargaining.

As a result of this organizing campaign the union filed an application for certification on July 25, 1989. Following a hearing on November 23, 1989 to determine whether the Board has constitutional jurisdiction to regulate the labour relations of Emery, the Board confirmed its jurisdiction and certified the OTEU as the bargaining agent for a bargaining unit described in the certification order dated December 1, 1989, as follows:

"all employees of Emery Worldwide, a CF Company, employed at Richmond, B.C., excluding sales staff, secretary to the terminal manager, warehouse supervisor, operations supervisor and those above".

(Board file 555-2976 - see also Emery Worldwide, a CF Company, unreported CLRB decision no. 768 dated December 13, 1989)

The specific sections of the Code said to have been violated are 94(3)(a)(i), 94(3)(c), 94(1) and 96.

The employer denied the allegations claiming that Michael Cooper had been laid off as part of a company-wide downsizing which had nothing to do with the recent union activities affecting its Vancouver operations where Cooper had been employed.

The Board conducted a hearing into the complaint at Vancouver on December 18 and 19, 1989.

II

Michael Cooper was employed as a warehouseman by the employer from August 1985 until he was laid off on November 9, 1989. During his employment he received favourable performance evaluations and his disciplinary record consisted of only two minor cautions. Of the six warehousemen employed by Emery as of November 9, 1989, Michael Cooper was the second most senior.

Explaining Cooper's lay-off, Emery submitted that it had experienced a substantial reduction in its freight forwarding business across Canada between April and September 1989. Accordingly, a corporate decision was made to lay-off some 20 employees across Canada. The Vancouver terminal was instructed to reduce its staff by two full-time positions and one half-time position. Because the drop in business meant that less freight was being handled, it was decided that the two full-time positions would be eliminated from the warehouse staff. The half-time position was cut from the office staff.

The employer went on to explain its policy that if staff reduction becomes necessary, it keeps its best workers regardless of seniority. The process used by the employer to select the two persons to be laid off was described in Emery's written submissions dated December 11, 1989, at pages 2 and 3:

- "3. *The Company considers that all of its warehouse employees are in general good workers, although some are better than others. The management involved, being the Terminal Manager, Operations Manager, Office Supervisor and Warehouse Supervisor, therefore got together to consider the difficult decision as to who should be laid off. A chart was prepared with the name of each employee and each employee was rated by the four management employees in each of nine different work-related categories;*
4. *The nine categories were punctuality, attendance, co-operation with co-workers, attitude to job, able to work without supervision, care of company equipment, work effort, knowledge of operations and willingness to work overtime. At the meeting, the four managers by consensus rated each employee in each category on a scale of three (good) down to one (poor). Enclosed herewith and marked Schedule "A" is a copy of the typed results of that survey which was performed before the decision as to who should be laid off was made. The job categories are listed along the top of the survey and the notations at*

the bottom give the rating criteria for each number given and the total point accumulation of each worker involved;

5. After the rating was done and the results compiled, the meeting of the four managers discussed whether the results properly reflected who should be laid off. After some discussion, it was decided that the appropriate course of action would be to lay off the two individuals who scored lowest on the assessment, being Michael Cooper who had scored 17.5, and Neil McCulloch who had scored 19;"

The foregoing evaluation process resulted in both Michael Cooper and Neil McCulloch being laid off. In its initial complaint the OTEU alleged that both Cooper and McCulloch had been laid off contrary to the Code, however, the allegations affecting Neil McCulloch were later withdrawn.

III

Although the OTEU used a shotgun approach when alleging which section of the Code had been violated, the relevant section is clearly 94(3)(a)(i):

"94.(3) No employer or person acting on behalf of an employer shall

- (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

- (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,"

In this type of complaint there is seldom direct evidence showing that an employer's actions are motivated by anti-union sentiments. The only party that usually has knowledge of why certain actions were taken is the employer itself. For these reasons the burden of proof is shifted to the employer by section 98(4) so that it is the employer who must satisfy the Board that its conduct was not anti-union motivated:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

The Board's approach to complaints under section 94(3)(a)(i) has been well documented. Anti-union motives need only be a proximate cause for employer action to be found to be a violation of section 94(3)(a)(i) of the Code. This policy was summarized by the Board in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) (now section 94(3)(a)) against an employee has been influenced in any way by the fact that the employee has, or is about to exercise rights under the Code then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) (now section 8(1)).

To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society
(1977), 20 di 281; 77 CLLC 16,083, at pages
284-285 and 16,549)

(Emphasis added)"

There is no direct evidence in this case to support the allegations by the union that Michael Cooper had been dealt with contrary to the Code. However, like many other complaints of this nature there are some tell-tale symptoms which cry out for the Board to draw such an inference.

First, there is the timing of the lay-off vis-à-vis the union activities and the selection of Cooper for lay-off at this particular time considering that there were other employees with less service and experience. The evidence which was presented to the Board regarding Cooper's previous evaluations which were more than complimentary certainly arouse suspicions about his sudden poor evaluation in the lay-off process. Even the topics used to assess the employees during this process raise questions and, after listening to the management witnesses and assessing their credibility, the Board suspects that these specific topics were chosen by the terminal manager to ensure that Michael Cooper came out with the least number of points.

Then there was the traditional denial by the management team of knowledge of Cooper's prominent role in the union organizing campaign. The best counsel for the union could do through cross-examination was to extract grudging admissions that they

may have surmised that Cooper was a union supporter. The evidence before the Board about meetings and discussions between supervisors and other employees and of union meetings which supervisors attended, suggest that management's knowledge of Cooper's union activities had to be much more than was admitted.

There was also the usual dredging up of every excuse possible to support Emery's contention that Michael Cooper had suddenly become the worst employee in the warehouse. For example, there were the two complaints against Cooper over his alleged mistreatment of company equipment and about his apparent indifference at work. These complaints were said to have come from a co-worker and from a customer and the incidents were conveniently used to assess Cooper demerit points in the critical lay-off selection process notwithstanding that the complaints had not even been documented at the time, nor had they ever been brought to Cooper's attention. It was circumstances like this that aroused the Board's suspicions that the topics used to grade the employees for lay-off purposes had been deliberately chosen.

Cooper's attendance record was also used to grade him negatively for lay-off purposes when it was clear from the evidence before the Board that most of his absences were for genuine medical reasons which had been approved or accepted by the employer as being bona-fide at the time.

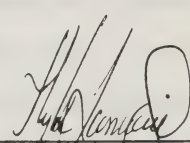
Taking all of these circumstances into account within the context of the afore-described Board policy of proximate cause, and, considering the purpose of section 94(3)(a)(i) of the Code, there are just too many inconsistencies here not to give Michael Cooper the benefit of the doubt. The Board is satisfied that the national lay-off called by Emery had nothing to do with the union activities at the Vancouver terminal but, in the

circumstances, we are not convinced that the selection of Michael Cooper for lay-off was not tainted at least in part by the employer's knowledge that he was mostly responsible for bringing the OTEU into Emery. Accordingly, Emery is found to have contravened section 94(3)(a)(i) of the Code.

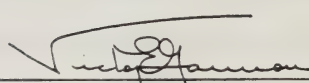
To remedy this violation of the Code, the Board hereby orders Emery, pursuant to the remedial powers contained in section 99 of the Code, to forthwith reinstate Michael Cooper in his employment and to compensate him in the amount he would have earned but for his unlawful lay-off.

The Board shall retain jurisdiction to deal further with these matters and the foregoing remedy. A formal order will not be issued at this time; however, the Board retains jurisdiction to do so should the need arise.

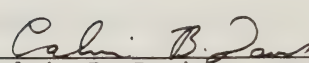
The foregoing is a unanimous decision of the Board.



Hugh B. Jamieson
Vice-Chairman



Victor E. Gannon
Member



Calvin B. Davis
Member

Dated at Ottawa this 12th day of January, 1990.

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information

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Summary

Y.B. POON, Y.K. HUI AND K.L. HO,
COMPLAINANTS, AND INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT LODGE
NO. 721 AND LOCAL LODGE 764,
RESPONDENTS, AND CANADIAN AIRLINES
INTERNATIONAL LTD., EMPLOYER.

Board File: 745-3162

Decision No.: 776

This decision involves a complaint
by Y.K. Hui, Bill Poon, and Ken Ho,
alleging that their union, the
International Association of
Machinists and Aerospace Workers
(IAM), has represented them in a
manner contrary to section 37 of
the Code. They maintain the union
has breached the Code by settling
a seniority grievance of a fellow
employee regardless of the way the
settlement would affect their own
seniority.

According to the Board, this com-
plaint is of a serious nature. Any
loss of seniority, even if it is
only one day, could seriously
affect an employee's chances of
maintaining a job, if there was a
lay-off. The Board found that the
union did turn its mind to the
complainants' grievance. It felt
the union's grievance committee had
little choice but not to proceed
with the grievance of the com-
plainants once the employer made
the decision to move up the fellow
employee's seniority date by one
day.

A union may refuse to pursue a
grievance where the matter raised
is not in dispute between the
parties to the collective agree-
ment. Of course, this does not
mean that the union and the
employer can adopt a position that
is contrary to the objectives of
section 37 of the Code.

The Board also comments that it is
not necessary to inform the members
every time a grievance is filed.
This could create chaos and the
system would soon become completely
bogged down and there would be long
delays in settling grievances. One
of the basics of a collective
bargaining relationship is a
process whereby there is a speedy
resolution of any disagreements
between the parties.

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Les motifs de décision seulement
peuvent être utilisés aux fins
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Résumé de décision

Y.B. POON, Y.K. HUI ET K.L. HO,
PLAIGNANTS, L'ASSOCIATION INTERNA-
TIONALE DES MACHINISTES ET DES
TRAVAILLEURS DE L'AEROSPATIALE,
SECTIONS N^{os} 721 ET 764, INTIMÉES,
ET LES LIGNES AERIENNES CANADIEN
INTERNATIONAL LTEE, EMPLOYEUR.

Dossier du Conseil: 745-3162

Décision n^o: 776

La décision porte sur une plainte
déposée par Y.K. Hui, Bill Poon et
Ken Ho, alléguant que leur
syndicat, l'Association interna-
tionale des machinistes et des
travailleurs de l'aérospatiale
(AIM), les a représentés d'une
façon allant à l'encontre de
l'article 37 du Code. Ils sou-
tiennent que le syndicat a enfreint
le Code lorsqu'il a réglé un grief
relatif à l'ancienneté d'un
collègue sans tenir compte de
l'impact possible du règlement sur
leur ancienneté.

Selon le Conseil, il s'agit d'une
plainte de nature grave. Toute
perte d'ancienneté, peu importe
s'il s'agit d'une journée, pourrait
influer sérieusement sur les possi-
bilités d'un employé de conserver
son emploi en cas de mise à pied.
Le Conseil juge que le syndicat a
bien étudié le grief des
plaignants. Il estime que le
comité de réclamations du syndicat
ne pouvait qu'abandonner le grief
dès que l'employeur avait pris la
décision d'accorder une journée
d'ancienneté au collègue.

Un syndicat peut refuser de donner
suite à un grief si la question
soulevée n'est pas contestée par
les parties à la convention col-
lective. Cela ne veut certes pas
dire que le syndicat et l'employeur
peuvent adopter une position qui
contreviendrait aux objectifs de
l'article 37 du Code.

En outre, le Conseil fait remarquer
qu'il n'est pas nécessaire d'in-
former les membres chaque fois
qu'un grief est déposé. Cela
pourrait causer de la confusion et
perturber le système; le règlement
des griefs prendrait un temps
énorme, alors que le principe de
la négociation collective repose
sur l'existence d'un mécanisme
permettant de régler promptement
tout conflit qui surgit entre les
parties.

The Board also made it clear that even though a grievor can appeal to the general membership when a grievance is dropped, the union is still obliged to ensure that their decision is not arbitrary, discriminatory, in bad faith, or in any way contrary to the Code. The complaint was dismissed.

En outre, le Conseil a fait ressortir que, même si un employé s'estimant lésé peut en appeler à l'ensemble des membres lorsque son grief est abandonné, le syndicat est tenu de s'assurer que sa décision n'est pas prise de façon arbitraire ou discriminatoire, de mauvaise foi ou de toute autre façon contraire au Code. La plainte est rejetée.

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| Relations du |
| Travail |

Reasons for decision

Y.B. Poon, Y.K. Hui and K.L. Ho,
complainants,
and
 International Association of
 Machinists and Aerospace Workers,
 District Lodge No. 721 and Local
 Lodge 764,
respondents,
and
 Canadian Airlines International
 Ltd.,
employer.
 Board File: 745-3162

The Board was composed of Mr. Thomas M. Eberlee, Vice-Chairman, Mr. Victor E. Gannon and Mr. Calvin B. Davis, Members.

Appearances:

Ms. Catherine Young, for the complainants;
 Mr. W.J. Farrall, for the respondents; and
 Mr. A.L. Belcher, for the employer.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

I

This decision involves a complaint by Y.K. Hui, Bill Poon, and Ken Ho, alleging that their union, the International Association of Machinists and Aerospace Workers (IAM), District Lodge 721 and Local Lodge 764, had represented them in a manner contrary to section 37 of the Code. They maintain the union has breached the Code by settling a seniority grievance of a fellow employee, Mr. Gerard Rafinon, regardless of the way the settlement would affect their own seniority.

The three complainants are long-time employees who started their employment with Canadian Pacific Air Lines Ltd. in Hong Kong. They then transferred to Montréal as aircraft mechanics: Mr. Hui began his employment on December 1, 1974; Mr. Poon, on November 18, 1976; and Mr. Ho, on March 30, 1980. Those dates represent the start of their company seniority.

In 1982, all three were laid off as aircraft mechanics. In 1984, Mr. Hui was called back and worked as a machinist for one year and a half. Mr. Poon was called back for six weeks, while Mr. Ho was not recalled until 1986. At this time, all three were called back to work with the understanding that the particular work in their classification would last approximately six to seven months.

In early 1986, the complainants were given the opportunity to take positions in Vancouver. They felt this would be beneficial and decided to accept the offer. Mr. Poon spoke with Mr. Cawley of the Personnel Department, and raised the subject of seniority. According to his testimony, Mr. Cawley told him it did not matter whether he started on graveyard shift or day shift, since the company's policy was to treat that as if it were a day shift start, thus seniority in that classification would start on February 10. The other two complainants were of the same opinion; they too believed it did not matter whether you started on the day shift or graveyard shift, seniority would accrue as if you had worked the day shift.

They all commenced employment in the Avionics, Heavy Maintenance classifications, on February 10, 1986 on the day shift. In accordance with the applicable collective

agreement, company seniority would prevail in instances where the classification seniority of employees is the same.

II

Mr. Gerard Rafinon, who was not an employee of CP at the time, became aware that the company was hiring avionic mechanics. He applied for a job and was hired to commence work around the same time as the three complainants. Mr. Rafinon had previously worked for PWA, and was also well aware of the seniority provisions in the collective agreement. He knew that if he could start before anyone else, he would be ahead of them on the seniority list. When Mr. Cawley called him to commence work, he told him that some people would be starting on the Monday morning. Mr. Rafinon then decided to start on the graveyard shift, which actually started at 11:30 p.m. the previous day, as he felt this would give him the head start he needed to be ahead of the others who would be starting on the following day shift.

When the seniority list was posted, he discovered his start date was the same as the three complainants. However, he was below them on the list as they had several years of company seniority. He then proceeded to file a grievance, claiming that his seniority should be updated by one day.

On February 27th, the employer denied the grievance. The letter sent by the employer to the union said:

"February 27, 1987

*Mr. L. Tremblay,
First Assistant Chief Shop Steward,
IAM & AW Lodge 764,
YVR Hangar*

*SUBJECT: CPAL/IAM Agreement #26 - Clause 12.02
G. Rafinon Grievance #13-87 - dated
Jan. 14, 1987
Director's Level Grievance Response*

During the hearing of February 25, 1987 you acknowledged that for the purpose of administering the Collective Agreement the first shift of the day is night shift, followed by days and afternoons. As such the new employee starting on night shift is starting on the same day as the new employee who starts later in the same day on day shift or afternoon shift. Such employees would be ranked on the seniority list by random selection and no unfair advantage would be forthcoming to the employee who started on night shift even though the Collective Agreement allows that shift to start thirty minutes into the previous day. The Company position on this situation was clarified recently in a letter to Mr. B.C. Woodruff dated July 29, 1986.

In light of the foregoing, there will be no adjustment made to the seniority date of the grievor and the grievance is denied.

Yours truly,

(signed)
C. Nassenstein
Director, Aircraft & Component Maintenance

c.c. A. Belcher
J. Russell
J. Korbin
D. Mitchell
A. Kinwig
R. Steeves

CN/JAR/sjm"

The union then informed Mr. Rafinon that their grievance committee was not going to pursue the grievance because once the employer turned it down, they no longer thought it had merit. Mr. Rafinon could appeal this decision at the general meeting of the union, which he decided to do. The membership agreed with him and upheld the appeal. The grievance was then processed to the next step (President's level) for handling.

At the third level of the grievance procedure, Mr. Steeves, union representative, and Mr. Belcher, Director, Labour Relations for the employer, further discussed Mr. Rafinon's grievance. Mr. Belcher knew that at a lower level of the procedure the grievance had already been turned down. To his recollection, prior to the Rafinon grievance no grievance of a similar nature had ever been filed. He came

to this conclusion after conducting an investigation to see if the matter had been addressed before and discovered that certainly at his level this issue had never been dealt with. After examining the collective agreement, he determined that the date was a calendar date. As the graveyard shift actually started one half hour into the previous day, he was convinced that the employer's earlier position should be changed and Mr. Rafinon's seniority date should be adjusted to February 9, 1986. Mr. Belcher also told the Board that subsequent to the Rafinon grievance, the new collective agreement defined the working day as the day the majority of the shift was worked.

When the next seniority list was published on March 11, 1988, the three complainants discovered that Mr. Rafinon's name was placed before theirs. The complainants then wrote to the union seniority committee questioning Mr. Rafinon's seniority date and were advised of the settlement of the grievance filed by Mr. Rafinon. They then proceeded to file a grievance of their own. The grievance was rejected by the employer. The grievance committee reviewed the grievance and decided that, in view of the settlement of Mr. Rafinon's grievance, there was no need to pursue the matter. The complainants were then given the opportunity to appeal to the general membership. This they did, with the general membership declining their appeal. They then filed this complaint with the Board.

III

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In William Tomlinson (1986), 68 di 20 (CLRB no. 599), the Board had the following to say about a union's responsibility under section 37 of the Code:

"It was in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, that the Supreme Court of Canada outlined a union's responsibility:

'The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.'

(page 527)

In this judgment, the Supreme Court referred to the Board's decision in Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443):

'In Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); and Jean Laplante (1981), 40 di 235; and [1981] 3 Can LRBR 52 (CLRB no. 320), the Board had the opportunity to enunciate the main principles of its policy respecting the interpretation of section 136.1 of the Code. A brief review of these principles is in order here. Without limiting the generality of the text of section 136.1, the Board indicated the criteria it would apply in determining whether a bargaining agent had discharged its duty of fair representation: serious negligence, discrimination, arbitrariness and bad faith. The Board stated that it would hold the bargaining agent to a much stricter standard where the career path of

a member of a bargaining unit may be seriously affected, the most obvious example being dismissal. It noted that it would consider the resources of the bargaining agent and warned that it would carefully scrutinize its actions in each specific case.

In past decisions in cases of this kind, the Board has repeatedly stated that it would not assume the role of arbitrator and decide the merits of a grievance, but that it must, in a number of situations, closely examine these merits in order to identify certain facts it requires in order to make an enlightened decision, within the limits of its jurisdiction. Although the Board might appear, in this situation, to be functioning as the arbitrator, this would be a false perception of its role which, in the end, would be strictly limited to deciding whether or not, in a particular case, the bargaining agent breached its duty of fair representation.'

(pages 124-125)

In André Cloutier (1981), 40 di 222; [1981] 2 Can LRB 335; and 81 CLLC 16,108 (CLRB no. 319), the Board established three criteria to assess whether a complaint filed under section 136.1 should be upheld.

These criteria are:

- (1) the nature of the complaint;
- (2) the characteristics of the bargaining agent;
and
- (3) steps taken by the bargaining agent."

(pages 26-27)

This complaint is of a serious nature. Any loss of seniority, even if it is only one day, could seriously affect the complainants' chances of maintaining their jobs if there was a lay-off.

The union is a relatively large union which has a long-established grievance procedure. They have set up grievance and seniority committees. They have also established an appeal procedure to deal with grievances that have been rejected at one of the steps of the grievance procedure. In accordance with this procedure, a member has a right to appeal to the general membership to have his grievance reviewed if the grievance committee no longer wishes to pursue the matter.

Upon perusal of the procedures followed by the union, the Board found that the union had settled the complainants' grievance, in the usual manner. There is one anomaly: Mr. Rafinon was informed of the three complainants' grievances being turned down and their right of appeal to the general membership, while the complainants were never made aware of Mr. Rafinon's grievance. However, the Board believes this is only a slight deviation from the usual procedures followed by the union and would not seriously affect the complainants.

Generally speaking, when the Board deals with duty of fair representation complaints, a member of the bargaining unit complains that the union has refused to process a grievance to arbitration or has mishandled it during the grievance procedure, such as missing a time limit. This type of complaint is usually straightforward as only the grievor, the union and the employer are seriously affected.

However, when dealing with seniority issues, other employees are almost always affected if a grievor is successful in having his seniority date changed. In such cases, unions therefore have a double-barrelled shotgun aimed at their heads. No matter what position they take, someone is going to be unhappy.

In Rayonier Canada (B.C.) Ltd., decision no. 40/75, June 16, 1975, the B.C. Board had the following to say about conflicts between employees:

"There is a second group interest in the settlement of grievances which applies even to cases which might succeed in arbitration. While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the

particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it:

'Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a 'right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations -- a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.'

(Cox, Law and the National Labor Policy, (1960) at pp. 83-84.)

It is for these reasons that we interpret Section 7 of the Code as conferring on the union bargaining agent considerable latitude in deciding whether to drop or to settle grievances brought under the standard collective agreement even though the individual employee wishes them pursued through to arbitration. ..."

(pages 12-14)

IV

Turning to the merits of the case, the Board must ask the following question: Has the union conducted itself in a manner contrary to section 37 of the Code? Having heard the evidence, the Board is not convinced that this is the case.

When the union settled Mr. Rafinon's grievance in his favour, it obviously must have been aware that the settlement would have serious ramifications for other members of the bargaining unit. The union had in place a seniority committee and knew that seniority was a political issue which could be explosive. When the grievance reached the third stage of the procedure it was dealt with by an experienced IAM representative and an equally experienced employer representative. Both individuals understood the serious nature of the matter and its effect on an individual's seniority.

It is true that for administrative purposes the employer considered that an employee who started on the graveyard shift at 11:30 p.m. was starting on the following day. However, neither the employer representative nor the union could recall a case where a newly hired employee had started on the graveyard shift. Therefore, when the grievance was pursued at the higher level, Mr. Belcher, after having perused the appropriate clauses in the collective agreement, concluded that the date in the collective agreement is a calendar date and so allowed the grievance.

As for the three complainants' grievances, the Board believes the union did turn its mind to these grievances. The grievance committee had little choice but not to proceed with the grievances once the employer had made a determination concerning Mr. Rafinon's grievance.

A union may refuse to pursue a grievance where the matter raised is not in dispute between the parties to the collective agreement. In other words, where the grievor or grievors invoke a right in the collective agreement which, based upon the employer's and the union's interpretation, cannot be upheld, there is no obligation to pursue the matter further. Of course, this does not mean that the union and employer can adopt a position that is contrary to the objectives of section 37 of the Code.

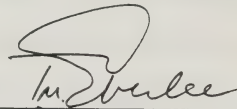
The union did not deviate from its usual procedure to settle grievances. Both it and management always tried to resolve their differences between themselves without resorting to arbitration. They adhered to this rule in this instance.

The complainants argued that they should have been informed of the Rafinon grievance. In fact the only conflicting evidence pertained to this very issue. The complainants claimed they knew nothing of the Rafinon grievance while witnesses for the union claimed the grievance had been discussed in their presence. Both sides agreed that Mr. Poon was present at the union meeting where Mr. Rafinon successfully appealed to the general membership to have his grievance processed further. At any rate, the Board feels it is not necessary to inform the members whenever a grievance is filed. Imagine the chaos if this were the case. The system would soon become completely bogged down and there would be long delays in settling grievances. One of the basics of a collective bargaining relationship is a process whereby there is a speedy resolution of any disagreements between the parties.

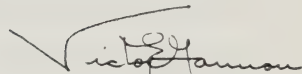
The union argued that if the Board upholds the complaint, the democratic means that they have developed over the years

to hear appeals of members at the general meetings would be in jeopardy. The Board acknowledges that the appeal system put in place by the union has worked well for years; however, we would like to clarify that this particular argument did not sway us in determining that the complaint is without merit. Even though this system of democratic review is available, the bargaining agent is still obliged to ensure that their decision regarding a member's grievance is not arbitrary, discriminatory, or in bad faith or in any way contrary to the Code.

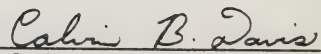
In conclusion, the complaint is dismissed.



Thomas M. Eberlee
Vice-Chairman



Victor E. Gannon
Member of the Board



Calvin B. Davis
Member of the Board

Dated at Ottawa this 12th day of January, 1990

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Summary

L'ASSOCIATION DES CHAUFFEURS
BELANGER LEMIRE INC., APPLICANT, AND
TRANSPORT BELANGER LEMIRE INC.,
TRANSPORT BELMIRE INC., AND EMPLOIS
NORDIQUES INC., EMPLOYERS, AND PAUL-
EMILE SALERNO ET AL, INTERVENORS.

Board File: 560-212
Decision No.: 777

These reasons deal with an
application seeking the review of a
bargaining certificate, under
section 18 of the Code, to determine
if the truck drivers paid by Emplois
Nordiques, assigned to the Beckel
contract performed by Bélanger
Lemire, are employees of Bélanger
Lemire under the Code, are covered
by the intended scope of the
bargaining certificate held by the
Association and covered by the
collective agreement entered into by
Bélanger Lemire and the Association.

The Board, after hearing the
parties, answered yes to the three
questions above after applying
different tests.

Résumé de Décision

L'ASSOCIATION DES CHAUFFEURS
BELANGER LEMIRE INC., REQUERANTE, E
TRANSPORT BELANGER LEMIRE INC., ET
TRANSPORT BELMIRE INC., ET EMPLOIS
NORDIQUES INC., EMPLOYEURS, ET PAUL-
EMILE SALERNO ET AL, INTERVENANTS.

Dossier du Conseil: 560-212
No. de Décision: 777

Les présents motifs portent sur une
demande de révision d'un certificat
d'accréditation, en vertu de
l'article 18 du Code, à savoir si
les chauffeurs payés par Emplois
Nordiques et affectés au contrat
Beckel, exécuté par Bélanger Lemire
sont des employés de Bélanger Lemire
au sens du Code, s'ils sont visés
par la portée intentionnelle du
certificat d'accréditation détenu
par l'Association et s'ils sont
régis par la convention collective
conclue entre Bélanger Lemire et
l'Association.

Le Conseil, après avoir entendu les
parties, a répondu oui aux trois
questions susmentionnées suite à
l'application de différents tests.

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Reasons for decision

L'Association des chauffeurs
de camions de Transport
Bélanger Lemire Inc.,

applicant,

and

Transport Bélanger Lemire
Inc., Transport Belmire Inc.
and Emplois Nordiques Inc.,

employers,

and

Mr. Salerno et al.,

intervenors.

Board File: 560-212

The Board was composed of Mr. Marc Lapointe, Chairman, and
Messrs. Robert Cadieux and J. Jacques Alary, Members.

Appearances:

Ms. Janine Kean, for the applicant;

Mr. Karl Jessop, for the employer; and

Ms. Monique Pinsonneault, for the Groupe des chauffeurs de
Emplois Nordiques Inc. (Montréal Division).

These reasons for decision were written by Mr. J. Jacques
Alary, Member.

I

This case deals with an application filed by the Association
des chauffeurs de camions de Transport Bélanger Lemire Inc.
(the Association), on March 14, 1989 pursuant to section 35
of the Canada Labour Code (Part I - Industrial Relations).
The Association asked the Board to declare, by order, that
employers Transport Bélanger Lemire Inc. (Bélanger Lemire),
Transport Belmire Inc. and Emplois Nordiques Inc. are a
single employer and a single federal work, undertaking or

business within the meaning of the Code. The application was subsequently amended to have the Board instead interpret the intended scope of the certification and declare:

"... that all drivers of Emplois Nordiques Inc., Location l'Achigan and Agence Pro-Jan are employees covered by the certification of the Association des chauffeurs de camions de Transport Bélanger Lemire Inc. and that the drivers performing the Bexel contract belonging to Transport Bélanger Lemire Inc. are employees covered by the certification,

... that the collective agreement covers the employees listed above and that they have never ceased to be covered by it; and

to order Transport Bélanger Lemire Inc. to pay the dues that otherwise would have had to be paid to the Association des chauffeurs de camions de Transport Bélanger Lemire Inc. for the entire duration of the employer's manoeuvres."

(translation)

After having received the investigation report, the Board decided that a public hearing should be held. At the beginning of that hearing, on August 31, 1989, counsel for the Association confirmed that she was abandoning the application pursuant to section 35 of the Code and confining herself to the amended version, which is basically an application for review of the certification certificate under section 18 of the Code. During the hearing, Paul-Emile Salerno, a driver, claimed to represent the Emplois Nordiques Inc. drivers assigned to the Bexel contract and asked that they be recognized as having intervener status. As it was not clear under what authority Mr. Salerno was acting, and as there had been a delay in the posting of the Board's notice at the Marché Central, the home base of said group of drivers, the Board granted Mr. Salerno and the group he claimed to represent one week to make their claims regarding intervener status if they chose to do so. The Board heard all the evidence of the other two parties during the hearing that began on August

31 and ended on September 1, 1989. In the meantime, the Board received the written submissions of the employees represented by Mr. Salerno, on September 8, 1989. It postponed until November 27 the public hearing to hear the parties' arguments.

At the sitting of November 27, counsel for said employees' group stated that she would confine herself to the facts entered in the record or received in evidence at the public hearing and that she was ready to begin the arguments. Whereupon the Board recognized Mr. Salerno et al. as having intervenor status.

II

The Facts

Transport Bélanger Lemire Inc. (hereinafter called Bélanger Lemire), whose head office is in St-Roch-de-l'Achigan, is an interprovincial transportation company established in 1975. Its main activity is transporting goods between Montréal and the Joliette, Berthierville, Sorel, Tracy, Rawdon and L'Assomption areas and between Quebec, Ontario, New Brunswick, Nova Scotia and Prince Edward Island. Bélanger Lemire also has transportation contracts with shippers.

Bélanger Lemire is wholly owned by Gestion Jean-Guy Lemire Inc., of which Jean-Guy Lemire is the chief administrator.

Emplois Nordiques Inc., of which the sole administrator is Gisèle Lafortune, the wife of Jean-Guy Lemire, is a truck driver leasing agency. In the past it has had various clients, including Bélanger Lemire. But at the time of the

public hearings, Bélanger Lemire was its only client. The Association des chauffeurs de camions de Transport Bélanger Lemire Inc. was certified by the Board on June 25, 1985 (file 555-2251) to represent

"all truck drivers of Transport Bélanger-Lemire Inc."

On December 7, 1987, Bélanger Lemire signed a transportation contract with the Coopérative fédérée de Québec (Bexel), which specializes in the slaughter of poultry and the distribution of poultry products. It undertook to deliver those products, both from the Bexel distribution centre located at the Marché Central in Montréal and between Bexel's various plants. That contract commenced on February 1, 1988 and will conclude on January 31, 1993, with an option to renew.

According to the terms of that contract, Bélanger Lemire must provide qualified personnel as well as a certain number of vehicles to be used exclusively for transporting Bexel products. Bexel also determines the colour of the vehicles, the lettering and the colour arrangement. Moreover, Bélanger Lemire must see that the drivers assigned to the contract wear a uniform, the design and colours of which are to be determined by Bexel. Most of the 31 drivers assigned to said contract were recruited by Bélanger Lemire from among the staff of former contractor Lacaille.

During the first two to three months of the contract, these drivers were paid by Bélanger Lemire. In late March or early April 1988, François Pelletier, Bélanger Lemire's dispatcher, informed them that they were being laid off by Bélanger Lemire and that if they wanted to continue working under said contract, they should attend a meeting organized

by Location Pro-Jan, scheduled for the following Saturday at a hotel on Ile Charron. Pro-Jan is a driver leasing agency not associated with Bélanger Lemire.

Jean-Guy Lemire and François Pelletier participated in that meeting. The drivers were asked to complete Pro-Jan hiring forms. They were told that they would perform the same tasks starting the following Monday, the only difference being that they would be paid by Pro-Jan. And in fact that was how they were paid until the end of September 1988.

It was during this period that the Association was involved in negotiating the renewal of its collective agreement. It sought an agreement extending from September 1, 1988 to August 31, 1990. During negotiations, the Association at one point raised the question of the drivers assigned to the Bexel contract, but the employer flatly refused to discuss the matter. Negotiations continued into conciliation, without the Bexel contract being brought up again.

It should be added that, according to the evidence, the Association chose not to meet with the drivers assigned to the Bexel contract at the beginning of operations, believing that it could not do so because of the three-month probation period provided for in the collective agreement. When it finally decided to meet with the drivers, the latter were no longer being paid by Bélanger Lemire. The Association never filed a grievance with respect to the work performed by the Pro-Jan drivers. The union president, Noël Pelletier, met with Mr. Salerno, a driver for Bexel, at the beginning of operations to give him information on the Association. A few days later, Mr. Pelletier again communicated with Mr. Salerno, who informed him that the drivers assigned to the Bexel contract were now being paid

by Pro-Jan. The Association took no further action until the present application was filed on March 14, 1989, as its officers felt that they could not seek to enlist the drivers assigned to the Bexel contract because the latter were being paid by an entity other than Bélanger Lemire.

In fact, at the end of September 1988, the drivers assigned to the Bexel contract and paid by Pro-Jan attended a meeting called by François Pelletier, the dispatcher at Bélanger Lemire. In attendance were representatives of Bélanger Lemire, including François Pelletier, Jean-Guy Lemire and Michel Labelle, the personnel manager. Mr. Labelle informed the drivers that the cost of using Pro-Jan's services was too high and that therefore, starting the following Monday, they would be hired by Emplois Nordiques Inc. The drivers were asked to complete a hiring form for Emplois Nordiques, and from the following Monday onward they were indeed paid by that company.

The evidence in this case also shows that Bélanger Lemire drivers were, and still are, not infrequently paid by Emplois Nordiques. By the same token, some drivers have been offered the opportunity to be transferred from Bélanger Lemire to Emplois Nordiques while continuing to perform the same work. The opposite also occurred, when some 13 drivers, other than those assigned to the Bexel contract, were transferred from Emplois Nordiques to Bélanger Lemire. Those drivers then became subject to the Association's certification.

III

Position of the Parties

The Association claims that the employer of the drivers assigned to the Bexel contract is Bélanger Lemire and that in reality those drivers are covered by the certification certificate. It contends that their work is no different from that performed by the Bélanger Lemire drivers. It concludes that the current collective agreement must apply to that group of drivers.

For its part, the employer contends that the 1985 certification certificate applies only to the operations directed from St-Roch, namely general transport. It argues that there is a difference between the Bexel contract and general transport. It contends that the operations and working conditions under the Bexel contract differ from those at Bélanger Lemire. It adds that the Bexel employees have no community of interest with their counterparts at Bélanger Lemire, and that the Association, which was aware of the Bexel contract, never did anything to try to represent the drivers who had been assigned to that contract. Lastly, if the Board finds that said drivers are covered by the certification certificate, the employer asks the Board to ascertain that they want to be represented by the Association.

For their part, the interveners, namely the drivers assigned to the Bexel contract, claim that they have no community of interest with the Bélanger Lemire drivers and constitute a separate unit. They argue that the work performed under the Bexel contract is different from that performed at Bélanger Lemire, and that what is involved here is an

enlargement of the bargaining unit affecting the intended scope of the certificate. They therefore ask the Board to take their wishes into account, since the applicant has never tried to represent the employees of Emplois Nordiques. For these reasons, the Board should dismiss the application, but if it finds that the certification certificate covers these employees, it should order a vote.

IV

The Law

In this matter, the Board must determine whether the intended scope of the certification certificate held by the Association covers the drivers assigned to the Bexel contract. However, the Board must first determine whether the drivers, paid by Emplois Nordiques and assigned to the Bexel contract performed by Bélanger Lemire, are employees of Bélanger Lemire within the meaning of the Code. Finally, if the Board finds that these drivers are employees of Bélanger Lemire and are included within the scope of the certification certificate, it must decide whether the collective agreement concluded between Bélanger Lemire and the Association applies to the employees assigned to the Bexel contract and paid by Emplois Nordiques Inc.

(1) Employment Relationship

In order to determine whether the drivers paid by Emplois Nordiques and assigned to the Bexel contract are employees of Bélanger Lemire within the meaning of the Code, the Board applies a series of tests that it has often outlined in previous decisions. The last Board decision where these tests were reviewed is that of Nationair (Nolisair

International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRBR no. 630). The following is a relevant passage from that decision:

"Urbain et Chartrand Inc. (1985), 55 di 257 (CLRBR no. 508)

The union applied for certification to represent the drivers of the Charter Division of Urbain et Chartrand, a bus transportation company. To summarize the complicated facts of this case, the company was comprised of several entities (Autobus Concorde, Autobus Deshaies, Urbain et Chartrand, Location d'autobus et d'autos M & G Inc.), all controlled by the Chartrand family and each operating in a particular field: deluxe bus travel, school bus operations, charter, bus maintenance and repair, etc.

Objecting to the Board's constitutional jurisdiction (on the grounds that its activities were intraprovincial), Urbain et Chartrand argued that the drivers covered by the application, who sometimes made interprovincial trips, were leased to another entity, Autobus Concorde, and therefore that it did not fall under the Board's jurisdiction because a personnel leasing agency clearly falls under provincial jurisdiction.

In identifying the employment relationship, the Board did not dwell on what it called the corporative mysteries. It concluded that Urbain et Chartrand met the criteria used to identify an employer:

'In the present case, they are hired by Urbain et Chartrand. It is Urbain et Chartrand who pays them. It is the director of personnel of Urbain et Chartrand who has been vested with the responsibility for their industrial relations. A dispatcher of Urbain et Chartrand assigns their work. The administrative services of Urbain et Chartrand staffed with Urbain et Chartrand employees take care of the travel contracts which they then execute, do the accounting and the commercial publicity and clerical work stemming from the work they perform. They are under the control of, subject to and subordinated to Urbain et Chartrand Inc.

Under the provisions of the Canada Labour Code, these are all criteria which make an employer of Urbain et Chartrand Inc. Under the Canada Labour Code, any person satisfying these criteria has an employer and is an employee. ...'

(page 279)

In this particular case, as in Kent Line Limited, supra, the employees' perception was not considered a determinative factor:

'... The evidence which was adduced that shows that some employees believed without being told differently that they were at the employ of a

Concorde Division of Urbain et Chartrand Inc. only underscores the difficulty experienced by the standard employee when confronted with the corporative mysteries. If that employee and his colleagues had gone on a strike, now illegal but possible in the long past, the one person who would have come out in the yard and would have told them that they would be fired within the next five minutes if they went on striking, would have been Marcel Chartrand, as their employer, and they would have found fast enough who the employer was. Nowadays, it is more complicated.'

(page 279)

The Board noted that the practice of leasing employees appeared to have succeeded to some degree in the United States in allowing the lessee to avoid the unionization of his business. Commenting on an American author, the Board stated:

'It will have been noticed that the author speaks freely about this technique, in addition to responding to legitimate economic needs of small enterprises, as being a means for some employers to get rid of a union and of collective bargaining. The National Labor Relations Act of the U.S.A. does not contain the Preamble to Part V of the Canada Labour Code. But even in that other jurisdiction, Courts and the American Board have developed means to minimize the noxious consequences of this new employment relationship upon the establishment and preserving of the rights of employees to collective bargaining.'

(page 282)

Thus, the Board suggested that it would not allow an employer to evade, through this legal fiction known as employee leasing, its obligations under the Canada Labour Code.

In this regard, a recent study of this practice in the United States puts the actual number of American companies engaged in the practice of leasing permanent employees at 200. Moreover, the study estimates that the number of leased employees, which stood at 4,000 in 1983, had increased to 60,000 in 1984 and will reach 10,000,000 during the decade. After reviewing various legal and practical aspects of this procedure, the author concludes with a warning:

'An employer's decision whether or not to become a subscriber and enter into a leasing agreement must, however, be made with a clear understanding of his/her potential legal liabilities and changed role under such an agreement. If the subscriber is to avoid being held the common law employer or a joint employer, s/he must be willing to relinquish total control over the employees including all determinations of wages, hours, and working conditions ... The opportunities are attractive but should not overshadow an awareness of the accompanying legal obligations.'

(Barbara McIntosh, 'Employee Leasing Issues: Employer Determination and Liability Considerations' (1987), *Labour Law Journal* 11, pages 19-20)

It is therefore in the light of the factual situation rather than the form of the transaction that the employment relationship must be assessed. Certainly the contracts between the agency and its client must not be ignored. However, a careful examination of the factual situation of the employees will be determinative.

As many others before us have said, the existence of an employment relationship between A and B must above all be examined in the light of what the facts reveal about the performance of the work and the establishment of such a relationship. (See Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383).)

1. The Board will assess the factual situation but will not give decisive weight to agreements where they are not confirmed by the facts.

Thus, in our jurisdiction, significant weight cannot be given to the payment of wages. The Canada Labour Code speaks of an employee (employé) and makes no reference to remuneration in the definition of this term, contrary to the Quebec Labour Code, for example, which gives a salaried employee (salarie) freedom to associate. More significant will be the identification of the person who does the paying, who ultimately bears the cost, and the impact this has on the employment relationship.

2. Another indicator will surely be the person who controls access to employment: the person who hires or who gives the work to be performed. Here, regard must be had to the selection process and the criteria used. The person who in fact has the power to approve the selection and influence it decisively is more akin to an employer than a mere occasionnal user. The lessee who retains or exercises a veto or the equivalent over the selection of personnel is certainly not extraneous to the employment relationship.

3. A third criterion concerns the actual establishment of working conditions. Who actually establishes working conditions? An agency that is merely a disguised employment office, a kind of clearing house with a title, could hardly be termed an employer. In this situation, it would merely be an agent acting on behalf of the employer, the equivalent of the personnel department of a company of which it is an integral part and whose wishes it carries out as an employee.

4. Another criterion concerns the actual performance of work. How is the work performed on a day-to-day basis? Who assigns the work? Who in fact determines and approves the standards governing the performance of the work? In this regard, who has the last word, the final say? Is it the person who evaluates, who decides, who

determines that an employee will work or be terminated because of his performance? What expertise does the agency have with respect to the work performed? What is the degree of similarity between the duties performed by regular employees and those performed by employees from outside?

5. Other criteria may also assist the Board in its determination: the employees' perception, their identification with the company, their degree of integration into the company, the fortuitous, temporary or permanent nature of their employment with the leasing company.

Finally, it is essential that these criteria, whose significance may vary from case to case, be weighed without losing sight of the purpose of the legislation, namely, to promote access to collective bargaining:

'The Board cannot be satisfied with cosmetic solutions; the consequences of certification are far-reaching. It would be harmful and contrary to the spirit of the Code if the Board were to certify a group of employees who would never be able to create a balance of forces in their relations with their real employer. There is an old civil law maxim to the effect that one cannot give someone something and at the same time keep what one has given. The Board has trouble accepting the fact that the service of employees could be contracted out permanently to a third party and at the same time be considered to have been retained when these employees seek certification. The Board finds it even harder to accept that this could occur without creating some significant employment relationship between this third party and the contracted out employees. To accept such an argument without positive proof that no such relationship exists would, in the Board's opinion, offend against the spirit of the Code. ...'

(Maska Manpower Inc., supra, page 204)

(See also Urbain et Chartrand Inc., supra, and for a recent study of the concept of employee in relation to the concept of contractor, see Canada Post Corporation (1987), 69 di 173; 16 CLRBR (NS) 149; and 87 CLLC 16,029 (CLRB no. 626).)"

(pages 72-75; and 108-112)

The evidence of the facts in this case, reviewed in light of the above tests, indicates the following factors.

1. The employees assigned to transporting Bexel products were not hired by anyone other than Bélanger Lemire. It was the latter company that recruited them from a company that bore the name Lacaille. It was not the employee leasing firm Pro-Jan that recruited and hired them. The managers of Bélanger Lemire were the ones who called said employees together and "incited" them to sign Pro-Jan's hiring forms and assigned them to the work to be performed under Bélanger Lemire's contract with Bexel. But this sleight-of-hand did not yield the desired results, namely, control of a group of drivers not subject to the terms and conditions of employment -- especially the wage scales in the collective agreement -- and hence lower outlays on wages. Since the Pro-Jan strategy was inadequate in that respect, Bélanger Lemire's managers once again called together the driver employees leased from Pro-Jan and "incited" them to sign the hiring forms of another employee leasing agency. This time it was Emplois Nordiques Inc., a safe company for Bélanger Lemire since it was entirely owned and governed by Gisèle Lafortune, Jean-Guy Lemire's wife, who was its sole administrator. Jean-Guy Lemire was the principal shareholder of Bélanger Lemire and also its chief administrator, all owing to the overarching role of the management group Gestion Jean-Guy Lemire Inc. Furthermore, at the meeting called to "incite" said drivers to go from Pro-Jan to Emplois Nordiques Inc., Michel Labelle, Bélanger Lemire's personnel manager, did not beat around the bush. The reason he gave for "inciting" the drivers was that "the cost of using Pro-Jan is too high" (see page 6 above).

2. At all times during these transfers of jobs from Bélanger Lemire to Pro-Jan and from Pro-Jan to Emplois Nordiques Inc., the dispatcher in charge of assigning

drivers to the Bexel contract always was, and still is, François Pelletier, an employee of Bélanger Lemire and a dispatcher with that employer.

3. Bélanger Lemire itself has indirectly admitted that the existence of Emplois Nordiques Inc. did not reflect an "arm's-length" employment contract between two companies linked by a legitimate contract entered into by a company leasing the services of drivers under its total control and a trucking company. In the performance of his duties, the dispatcher of the leased employees was acting on behalf of the lessee of said drivers.

Indeed, some time prior to the public hearings into this matter, Bélanger Lemire confessed that a number of drivers (13) other than those assigned to the Bexel contract, but whose services were supposed to be leased by Emplois Nordiques Inc., were in fact employees of Bélanger Lemire and agreed that they be covered by the collective agreement between Bélanger Lemire and the applicant association. Furthermore, the evidence has shown that it was not unusual for Bélanger Lemire drivers to be paid by Emplois Nordiques Inc. and that occasionally Bélanger Lemire drivers were invited to transfer to Emplois Nordiques Inc. and continue to be assigned the same work as before.

For the purposes of the Code in the matter of the employment relationship, Emplois Nordiques Inc. is merely a corporate fiction whose only intended function was and is to attempt to reduce costs for tax purposes and thus increase profits. If the existence of this company was also intended to get rid of unionism, that attempt has failed in the course of events. Furthermore, the certified union did not file a complaint of unfair practice -- although its counsel made

accusations to that effect during the public hearing -- whereas in all likelihood it would have been justified in doing so.

In any event the employer has abandoned that part of its argument against the present application.

4. It is highly likely that all the administrative services required by Emplois Nordiques Inc. are provided "within the family," that is, by Bélanger Lemire. Moreover, the Board notes that whereas all the managers of Gestion Jean-Guy Lemire Inc. and Bélanger Lemire were present at the Board's public hearing, Emplois Nordiques Inc. did not seek party status or even make its presence known.

5. According to the evidence it is quite clear that Bélanger Lemire did not relinquish sufficient control of the employees supposedly hired by Emplois Nordiques Inc. for the latter company to be the only true employer of those drivers. That was and is a pure fabrication.

6. The mere fact that wages were paid by Emplois Nordiques Inc. does not carry significant weight.

It is furthermore through Bélanger Lemire, and Bélanger Lemire alone, that all the drivers have access to their employment, regardless of whether they are paid by the latter company or by Emplois Nordiques Inc. And it is Bélanger Lemire that has retained the actual task of allocating all work assignments.

In reality, Emplois Nordiques Inc. is only an agent acting for Bélanger Lemire; at most it is an extension of the personnel department administered by the personnel manager

of Bélanger Lemire, and hence it is an extension of the personnel department of Bélanger Lemire.

7. At the beginning of Bélanger Lemire's contract with Bexel, the drivers assigned to it were paid by Bélanger Lemire. When they eventually came into the employ of Pro-Jan and then of Emplois Nordiques Inc., there was no change in their experience of their duties, except that the cheque came from another corporate entity.

Furthermore the evidence shows that when Mr. Salerno, the representative of the group of drivers assigned to Bexel, inquired about terms and conditions of employment, he dealt with Jean-Guy Lemire, the head of this entire group of companies. This is why to this day, these drivers consider Mr. Lemire to be their employer, and with reason.

Having applied the tests listed above to the facts of this case, the Board concludes that the drivers assigned to the Bexel contract, even though they were paid by Emplois Nordiques Inc., are employees of Bélanger Lemire within the meaning of the Code.

(2) Whether or Not Covered by the Certification Certificate Held by the Applicant Association

The certification certificate held by the Association des chauffeurs de camions de Transport Bélanger Lemire Inc., granted by the Board by order dated June 25, 1985, reads as follows:

"all truck drivers of Transport Bélanger-Lemire Inc."

(from Board file 555-2252)

The above-mentioned file, involving an application for certification, reveals that the Association's original application covered "all employees" of Transport Bélanger Lemire Inc. with the exception of management personnel. Following the employer's representations, the union agreed to amend its application to cover "all truck drivers" of the company. At no time, however, was there any question of specifying a home base such as St-Roch-de-l'Achigan or a specific operation of the company.

An examination of the documents in the Board's certification file 555-2251 shows that at the time of certification, Bélanger Lemire was a general truck transport company holding a great number of licences, as it does today, some of which authorized the use of isothermal vehicles to transport poultry products or other products for all sorts of shippers, including Volco Inc., a company specializing in the slaughter of poultry and distribution of poultry products.

As an example in the present case, we would cite the testimony of Bélanger Lemire driver Yves Vincent. At the time he was responsible for assigning trucks and preparing Bélanger Lemire delivery itineraries under the Volco contract. He stated, without being contradicted, that the Bélanger Lemire trucks, even though they were not assigned exclusively to the Volco operation, had their home base at Joliette. For his part, Bélanger Lemire driver Paul Saucier testified that he picked up his truck in the morning at the Volco premises in Joliette to make his deliveries in Montréal. There he picked up for the return trip general freight to be delivered to St-Roch, but in the evening he returned the truck to the Volco yard in Joliette.

Along similar lines, the Board also heard the uncontradicted claim that a Bélanger Lemire driver who was assigned to a contract with Terra had to report to Ville St-Laurent or Carignan to pick up his truck and take it back there at the end of his delivery shift.

This evidence considerably weakens the claims of Bélanger Lemire regarding the intended scope of the certification certificate.

1. In 1985, Bélanger Lemire did not take the position that only drivers based at St-Roch were covered by the certification. It sometimes happens that depending on the specific circumstances of a certification case, the Board determines that an appropriate bargaining unit covers only employees based at a given geographic location. Such was not the case here, and, as would appear from the Board files, this was with the agreement of the parties. The intended scope of the certification certificate is clear: all drivers employed by Bélanger Lemire.

2. Now Bélanger Lemire claims that the Bexel contract is outside the scope of the certificate. The main reason given is that the drivers in question do not have their home base at St-Roch-de-l'Achigan but rather at the Marché Central in Montréal. It infers that only the drivers based at St-Roch are covered by the intended scope of the certificate.

We cannot agree with this other claim, for two reasons. Firstly, the wording of the certificate does not support it. Secondly, the above evidence shows that prior to the contract with Bexel, Bélanger Lemire, operating under other delivery contracts, not only dealt with, among other things,

the same specialty as with Bexel -- transporting poultry products by special trucks -- but moreover agreed in the performance of various contracts that some trucks would be based (as would their drivers) elsewhere than at St-Roch (such as at Joliette, St-Laurent or Carignan).

In short, disregarding the exclusivity of service that was allegedly specific to the Bexel contract, there were, when the certification certificate was issued at Bélanger Lemire, transportation operations quite similar to those that Bélanger Lemire has undertaken to perform for Bexel, whether with regard to the type of products transported, the equipment used or the place to which drivers had to report at the beginning of their work day.

3. As regards the special nature or exclusivity of the Bexel contract, even taking the particular related conditions into account, this in our view does nothing to change the intrinsic nature of the company, with all its licences, which is that of a general trucking company.

Consequently, the Board concludes that the intended scope of the certification certificate covers the transportation of goods by the drivers assigned to perform the Bexel contract. (See Teleqlobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198).)

There remains the claim of the interveners and, in part, that of the employer, to the effect that the Association's application constitutes an enlargement of the certification certificate and hence a change in the intended scope of the said certificate, and that therefore the Board must concern

itself with the wishes of the drivers assigned to the Bexel contract.

In view of the conclusion that the Board has stated above, it must reject these claims. However, the Board cannot but comment on the role played by the Association in this matter. It was slow to react to the Pro-Jan and Emplois Nordiques developments and the employer's refusal, at the resumption of bargaining to renew the collective agreement, to discuss the terms and conditions of employment of the drivers assigned to the Bexel contract. From the designation of the parties in this case, it will have been deduced that the Association is an independent union, that is, one without union affiliation. Furthermore the group of employees represented is not large. Nevertheless, this does not excuse a bargaining agent certified by the Board. And this slowness on the Association's part could only serve to confuse those involved and blur the picture, particularly when it is considered in combination with the naivete exhibited by a witness for the union in admitting in evidence that the union had made no effort to sign up these new fellow workers (new because they were recruited by Bélanger Lemire from among the former employees of Lacaille in order to meet the need to perform the new contract with Bexel) because it believed that since they were being paid by a company other than Bélanger Lemire, it was not entitled to do so.

This brings us to the conclusions sought by the Association and the general conclusions reached by the Board.

The Association asks the Board to declare that the employees who were assigned to the contract between Bélanger Lemire

and Bexel and paid by Emplois Nordiques Inc. are an integral part of the bargaining unit certified by the Board.

It also asks that the collective agreement between it and Bélanger Lemire apply to the said employees.

Lastly, it asks that the union dues of all the members of the bargaining unit, to be withheld by the employer under the collective agreement, be reimbursed to the Association, retroactive to the beginning of the "duration of the employer's manoeuvres."

The evidence reveals that the Association did not negotiate special conditions for the drivers assigned to the Bexel contract at the time of the renewal of the collective agreement ending on August 15, 1990.

In Alberta Government Telephones Commission (1989), as yet unreported CLRB decision no. 726, the Board stated as follows:

"It was suggested to the Board that if a single certification order was to be granted, then the parties would still be in a position to negotiate three collective agreements. In our view, that is not correct. In looking at the Code, it is clear to us that a certification implies a single collective agreement; that parties cannot negotiate more than one collective agreement where there is a single certification order. That is not to say that the parties could not negotiate a single collective agreement and have different appendices or documents each relating to a particular group as, for example, one annex for clerical, one annex for traffic and one annex for plant. But there must only be one collective agreement between the parties. ..."

(pages 19-20)

Having found that the drivers who were assigned to the Bexel contract and paid by Emplois Nordiques Inc. are employees

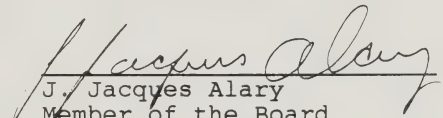
of Bélanger Lemire and are thus covered by the certification certificate held by the Association, the Board concludes that said drivers are indeed covered by the collective agreement between Bélanger Lemire and the Association, expiring on August 15, 1990. If Bélanger Lemire, operating through or together with Emplois Nordiques Inc. or on its own, granted special conditions to the employees assigned to the Bexel contract, the parties can still attach or negotiate additions to said collective agreement to take this into account. But the Association and Bélanger Lemire will need to agree on such a matter. The Board adds that the parties must not forget that so long as the existing collective agreement remains in force and the requirements of the Code are not met, they do not have the right to lock out or strike.

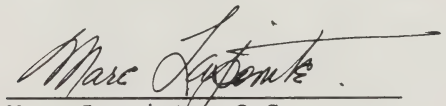
In the meantime, the terms of the collective agreement apply in full.

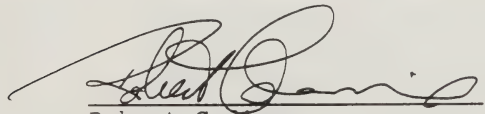
Lastly, the Board must deny the Association's request that it order Bélanger Lemire to pay retroactively the union dues of the employees involved, namely the drivers assigned to the Bexel contract.

In accordance with article 5 of the collective agreement, any employee covered by the agreement must, as a condition for maintaining his employment, be a member of the Association and remain one for the duration of said employment. Furthermore, the employee must sign an authorization for the deduction of dues from his pay cheque, in accordance with the employer's promise to the union to have him do so.

There are several reasons for denying this request. The first is that it is vague. The period covered is to be retroactive. But retroactive to when? To the beginning of the "duration of the employer's manoeuvres"? The Association filed no complaint of unfair practice. It was only during the presentation of evidence on a review of the bargaining unit that certain actions of the employer came to light. The union's negligence is another reason. We do not believe that it is fair for the new members of the bargaining unit to pay the costs of such negligence. The collective agreement applies to them from the moment this decision is issued, and they will have to pay those costs for the duration of the collective agreement.


J. Jacques Alary
Member of the Board


Marc Lapointe, Q.C.
Chairman (pursuant to
section 11 of the Code)


Robert Cadieux
Member of the Board

DATED at Montréal, this 17th day of January 1990.

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information



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INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL LODGE 2413, CERTIFIED
BARGAINING AGENT, AND ALLCAP BAGGAGE
SERVICES INC., EMPLOYER.

L'ASSOCIATION INTERNATIONALE DES
MACHINISTES ET DES TRAVAILLEURS DE
L'AEROSPATIALE, SECTION LOCALE 2413,
AGENT NEGOCIATEUR ACCREDITE, ET
ALLCAP BAGGAGE SERVICES INC.,
EMPLOYEUR.

Board File: 675-20
Decision No.: 778

Dossier du Conseil: 675-20
No de Décision: 778

The Minister of Labour referred to
the Board for consideration of first
agreement arbitration under section
80 of the Canada Labour Code (Part I
- Industrial Relations) a dispute
between Allcap Baggage Services Inc.
(Allcap) and the International
Association of Machinists which
represents Allcap employees who are
engaged as porters at Pearson
International Airport, Toronto.

Le Ministre du Travail a renvoyé au
Conseil, en vue d'examiner la
possibilité d'imposer une première
convention collective en vertu de
l'article 80 du Code canadien du
travail (Partie I - Relations
du travail), un différend opposant
Allcap Baggage Services Inc.
(Allcap) et l'Association
internationale des machinistes qui
représente les employés d'Allcap
embauchés comme bagagistes à
l'Aéroport international Pearson, à
Toronto.

Labour Canada advised the Board that
doubts existed as to whether Allcap
came under federal or provincial
constitutional jurisdiction. The
Board decided that this question had
to be addressed at the initial stage
of its consideration of the
reference and asked for submissions
from the parties.

Travail Canada a informé le Conseil
que des doutes subsistaient quant à
savoir si Allcap était du ressort
fédéral ou relevait de la compétence
provinciale. Le Conseil a jugé que
cette question devait être abordée à
la première étape de l'examen du
renvoi et a demandé aux parties de
présenter leurs arguments.

In coming to a conclusion, the Board
applied the law as set out in
Supreme Court of Canada and other
court decisions and concluded that
Allcap is not a «federal work,
undertaking or business» and that
therefore the Board had no
jurisdiction to deal with the
section 80 reference. A further
consequence determined by the Board
was that the certification order
issued in 1988 to the International
Association of Machinists in respect
of Allcap employees had now to be
deemed of no force and effect.

Pour arriver à une conclusion, le
Conseil a appliqué le principe
énoncé dans divers jugements de la
Cour suprême du Canada et d'autres
tribunaux et a conclu que
l'entreprise d'Allcap n'est pas une
entreprise fédérale et que, par
conséquent, le Conseil n'a pas
compétence pour statuer sur le
renvoi formulé en vertu de l'article
80. En outre, le Conseil a jugé que
l'ordonnance d'accréditation rendue
en 1988 à l'égard de l'Association
des machinistes qui représente les
employés d'Allcap était réputée être
sans effet.

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Reasons for decision

International Association of
Machinists and Aerospace
Workers, Local Lodge 2413,

certified bargaining agent, and
Allcap Baggage Services Inc.,
employer.

Board File: 675-20

The Board consisted of Vice-Chairs Thomas M. Eberlee and Louise Doyon and Member Robert Cadieux.

The reasons for decision were written by Vice-Chairman Eberlee.

Appearances:

Margaret Leighton, for the International Association of Machinists and Aerospace Workers, Local Lodge 2413, and Clinton Blake, for Allcap Baggage Services Inc.

I

The issue addressed in these reasons for decision is whether Allcap Baggage Services Ltd. is a "federal work, undertaking or business" within the meaning of section 2 of the Canada Labour Code. The question has arisen in connection with the Minister of Labour's direction to the Board to consider the imposition of a first collective agreement on the parties.

The International Association of Machinists and Aerospace Workers, Local Lodge 2413 (the union) was certified by a differently constituted quorum of this Board on September 6, 1988 to be the bargaining agent for "all employees of

Allcap Baggage Services Inc., working at the Pearson International Airport (Toronto) in porter services, excluding persons exercising managerial functions." On May 19, 1989, yet another quorum of the Board issued Board Decision No. 744 in which Allcap Baggage Services Inc. (the employer) was found to have violated certain provisions of the Canada Labour Code (Part I - Industrial Relations) in that employees had been fired for union activity. Neither in connection with the certification application nor in the proceedings leading up to Board Decision No. 744 was the constitutional jurisdiction of the Canada Labour Relations Board to deal with the matters brought into question by either of the two parties in this file, although it was raised by another respondent party in another application by the union that was withdrawn prior to the consideration of the certification application.

Under date of September 6, 1989, the Board received the following letter from the Senior Assistant Deputy Minister of Labour Canada:

"Mr. J.F.W. Weatherill
Chairman
Canada Labour Relations Board
4th Floor, 240 Sparks Street
Ottawa, Ontario
K1A 0X8

Dear Mr. Weatherill:

In the matter of the Canada Labour Code (Part I - Industrial Relations) and a dispute affecting Allcap Baggage Services Inc., Scarborough, Ontario, and International Association of Machinists and Aerospace Workers, Local Lodge 2413

This letter is in connection with a collective bargaining dispute affecting the above-cited parties. The union has been attempting to negotiate a first collective agreement for a unit of approximately fifty porters working at Pearson International Airport which was certified by the Canada Labour Relations Board on September 6, 1988.

The parties met in direct negotiations on October 24, 1988, March 7, 1989, and June 7, 1989, but could not reach an agreement. Mr. Warren Edmondson was appointed as conciliation officer in this dispute on June 26, 1989, and met with

the parties on July 11 and 20. When an impasse was reached in conciliation, the officer filed his report and the parties were subsequently advised on August 21, 1989, that a conciliation commissioner would not be appointed.

There is a question of jurisdiction which is relevant to this dispute of which you should be made aware. The Federal Mediation and Conciliation Service involvement with the dispute has been based upon the certification order issued by the CLRB on September 6, 1988. However, the department has not accepted minimum wage complaints made by Allcap employees under Part III of the Code because a legal opinion has been received determining that Allcap employees most likely do not fall under federal jurisdiction for the purposes of Part III of the Code.

Following a careful review of the dispute, and in consideration of the inability of the parties to negotiate a first collective agreement, the Minister hereby directs the Board, pursuant to Section 80 of the Canada Labour Code (Part I - Industrial Relations) to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of a first collective agreement between the parties. The parties are being advised of the Minister's decision in this matter.

Yours sincerely,

(signed)

Michael McDermott"

The present quorum was assigned to deal with this matter and a hearing was scheduled for October 23 and 24, 1989 in Toronto. The Board's notice advised that the hearing would focus entirely on the jurisdictional question: "The Board will want to hear evidence and argument as to whether or not the employees of Allcap are under federal or provincial jurisdiction for the purposes of Part I of the Code".

This was objected to by Ms. Leighton, representing the I.A.M. She pointed out that the employer, Allcap, had never disputed the Board's jurisdiction, nor had proceedings ever been initiated to challenge the exercise of the Board's jurisdiction. In a letter dated September 27, 1989, she stated:

"... In such circumstances we submit that the parties

have attorned to the jurisdiction of the Board. There is no basis, and it would serve no labour relations purpose, to re-open the question of jurisdiction.

Moreover, it is the union's position that the Minister has no status to bring this matter before the Board. The Minister's sole responsibility pursuant to section 80(1) is, where he or she considers it necessary or advisable, to direct the Board to enquire into the first contract dispute. The Minister, once having made that direction, cannot set pre-conditions upon the Board's exercise of its discretion to settle the terms and conditions of a first collective agreement between the parties."

Section 80 of the Code reads as follows:

"80.(1) Where an employer or a bargaining agent is required, by notice given under section 48, to commence collective bargaining for the purpose of entering into the first collective agreement between the parties with respect to the bargaining unit for which the bargaining agent has been certified and the requirements of paragraphs 89(1)(a) to (d) have otherwise been met, the Minister may, if the Minister considers it necessary or advisable, at any time thereafter direct the Board to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of the first collective agreement between the parties.

(2) The Board shall proceed as directed by the Minister under subsection (1) and, if the Board settles the terms and conditions of a first collective agreement referred to in that subsection, those terms and conditions shall constitute the collective agreement between the parties and shall be binding on them and on the employees in the bargaining unit, except to the extent that such terms and conditions are subsequently amended by the parties by agreement in writing.

(3) In settling the terms and conditions of a first collective agreement under this section, the Board shall give the parties an opportunity to present evidence and make representations and the Board may take into account

(a) the extent to which the parties have, or have not, bargained in good faith in an attempt to enter into the first collective agreement between them;

(b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and

(c) such other matters as the Board considers will assist it in arriving at terms and conditions that are fair and reasonable in the circumstances.

(4) Where the terms and conditions of a first collective agreement are settled by the Board under this section, the agreement shall be effective for a period of one year from the date on which the Board settles the terms and conditions of the collective agreement."

The Board does not dispute the broad outline of Ms. Leighton's view of the respective powers and responsibilities of the Minister and the Board under section 80 of the code. The Board is an independent tribunal; it is able to accept direction from the Minister of Labour only to the extent that such is mandated by the statute. In replying to Ms. Leighton, however, the Board advised as follows on October 3, 1989:

"As the parties are aware, agreement of the parties cannot confer constitutional jurisdiction on the Board. In the matter of its jurisdiction to exercise power under the Code, the Board must be correct.

In this instance, as is evidenced by the letter of September 6, 1989 referring the matter to the Board, there is a doubt about the Board's jurisdiction. In the Board's opinion, this doubt must be resolved at the initial stage in the consideration of the reference under section 80."

In short, the Board's decision to deal with the jurisdictional question was solely the Board's decision.

Finally, it was agreed between the parties that the issue of constitutional jurisdiction could be argued by way of written submissions to the Board. It was also understood and accepted by them in writing that the Board in making a jurisdictional determination would take into account the factual material in the original certification and single employer files and relevant facts in Board Decision No. 744 and its related file. Accordingly, this decision is based upon the aforementioned submissions and files.

Meanwhile, the hearing for October 23 and 24, 1989 was cancelled pending our jurisdictional determination.

II

Most of the airlines operating from Pearson International Airport are members of a grouping known as the Airline Operators Committee by means of which they deal collectively with problems and concerns. Until 1985, these airlines, through the Airline Operators Committee, actively and materially supported the provision of porter services for customers at the airport.

While the provision of facilities and services at an airport like Pearson is primarily the responsibility of Transport Canada, the airlines operating in and out of Pearson undertook to accept responsibility for arranging porter services. They did so by way of an agreement with a contractor. They paid the contractor a sum of money - it was said to be upwards of \$1 million per year prior to 1985 - and the contractor employed approximately 50 porters to serve the customers at the airport. The porters received a basic pay package from the contractor and, in addition, received tips from the customers whose bags they carried.

In 1985, the airlines decided to cease paying for porter services and to move to a "user-pay" system. Through the Airline Operators Committee, a contract was entered into between its member airlines and Hudson General Aviation Services Inc. by means of which Hudson agreed to "provide, maintain and operate a prompt, dependable, efficient and courteous porter service for passengers..." at Terminal 1. The duties of the porters were, on request, to "carry baggage of passengers from the curb to the ticket and/or check-in counters of the user airlines"; on request, to "locate and carry baggage from baggage claiming areas to the curb for passengers of the user airlines"; to "maintain

proper security to safeguard baggage while in the baggage claiming areas" and to "provide other services which are usual and customary". The contract also stated that nothing in it was to be construed as preventing any user airline from entering into a separate arrangement with Hudson for additional services.

The agreement, among other things, required Hudson to provide uniforms and identification badges for porters, to ensure a bilingual capacity in the group and generally to maintain a satisfactory standard of service. It was also required to have in force adequate public liability and property damage insurance. The means by which Hudson would obtain revenue to support its operation were not stated, although they were perhaps implied in section 15 of the agreement, which stated:

"15. Hudson shall place on all aviation carts and if necessary, at various points within the Terminal, signs indicating the "User fees" to be paid by the passengers of the User airlines for the provision of the services provided in this Agreement."

The file indicates that because of dissatisfaction with the system, Hudson terminated this contract after only three months. It appeared then that the 50 or so porters would be without any work and that porter services would no longer be available to the travelling public at Pearson.

Four porters then submitted a proposal to the Airline Operators Committee for the provision of porter services at Terminals 1 and 2 by way of an organization that they would establish, which would function along the lines of the Hudson arrangement on a user-pay basis. The proposal involved the porters collecting tips from the public and turning over a set daily or weekly amount of money to the new organization to cover its overhead expenses. There was

to be no cost to, or responsibility accepted by, either the airlines or Transport Canada for the service. The four porters established and registered Allcap Baggage Services Inc. and in June, 1985 the Airline Operators Committee accepted their proposal.

Allcap rented space in the terminals for offices and locker rooms, and signed individual contracts with the persons whom it employed as porters, most of whom had worked for many years as porters at Pearson. No formal contract was made either with the A.O.C. or its member airlines, although there clearly was an understanding between the airlines and Transport Canada on the one hand, and Allcap on the other, that Allcap and its people had the exclusive right to provide porter services to the public at Pearson airport.

The understanding between A.O.C. and Allcap involved Allcap covering each porter with liability insurance, paying realty and business taxes to the City of Mississauga, providing equipment such as hand trucks or carts, maintaining an appropriate complement of porters on duty as required and generally managing and supervising the service. The contract between each porter and Allcap set out in detail what Allcap would provide to each porter and the rules governing the porter's conduct and work. Porters were expected to pay Allcap a flat fee of \$80 per week at the beginning of each week and to collect tips from the travelling public for carrying its baggage, part of which would cover the \$80 fee and the rest of which would be the porters' income.

One of the conditions of being allowed to work as a porter was, and is, the possession of an I.D. provided by Transport Canada attesting to security clearance. This is,

of course, a requirement for any person employed by a concessionaire at any airport operated by Transport Canada. The actual work of Allcap's employees may be described as follows (although nothing really is different from the work sketched out in the Hudson arrangement):

- * they meet taxis, private cars and buses as they arrive at the airport terminals and are requested by passengers to carry their baggage into locations inside the terminals - normally the check-in counters; the passenger then pays the porter, on whatever basis the passenger decides (although one imagines there may be a bit of prompting by way of grunt or groan from the porter);

- * they are present at the baggage carousels when baggage from in-coming domestic flights is dumped and, on request, they carry baggage for customers from these locations to taxis, buses or private cars; sometimes the latter are in the parking garages; again customers pay them directly for the service;

- * they are also present inside the customs halls and assist passengers from foreign flights with their luggage through customs and outside to whatever means of transportation they may be utilizing.

The files also show that porters move through the terminals some baggage tubs belonging to the airlines. They also carry luggage for airline crews by arrangement with certain airlines and carry courier mail bags. These three functions are based on arrangements made between Allcap and the airlines or courier services concerned. Allcap collects fees for the services from the airlines or courier services and turns them over to the porters who have done the work.

In summary, it is clear that porter service at Pearson is not a function provided or even supported financially by either the airlines or Transport Canada, the owner and manager of the airport. It does not even appear to be a function for which the airlines or Transport Canada have any particular need, certainly not in terms of contributing anything tangible to ensuring its continued existence. The service, in its present manifestation at least, exists only because certain porters proposed a scheme by which it could continue on a "user-pay" basis and which would ensure that they and others who had been working as porters for many years at the airport could continue in this work. There is no evidence that it exists today because the airlines or Transport Canada need it or even sought its continuation.

The airlines and Transport Canada agreed to the scheme proposed by the four porters who founded Allcap and, in essence gave them the concession to provide the service. An alternative to the continuation of the service might well have been the provision of more baggage carts at locations in the terminal so that passengers could handle their own luggage directly. This was the system adopted for Mirabel airport, for example, where the Board understands, there are no porters on the premises.

In any event, the porter service cannot be viewed as being of any particular service or benefit to the airlines and Transport Canada. One cannot see the service as really benefiting the airlines or actually being part of the air transport service itself to any greater degree than other services located in the terminals - bars, book stores, newsstands, souvenir shops, snack bars, etc., also operated by concessionaires. The true beneficiaries of the porter

service are those members of the public who require assistance in carrying their baggage to check-in counters or from arrival carousels.

III

There is no doubt that Pearson International airport, the aircraft that fly in and out of it and the lines of air transportation that carry the public to and from it are federal works, undertakings or businesses that are within the legislative authority of Parliament. But the question before the Board is whether Allcap Baggage Services Inc., having regard to the functions it performs vis à vis the airport and airline operations, is also a federal work, undertaking or business.

The law, as perhaps best and most clearly enunciated in the Supreme Court of Canada decision, Northern Telecom Ltd. v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; and (1979), 98 D.L.R. (3d) 1 (Telecom 1), is that the regulation of employer-employee relations and labour-management relations falls generally into the provincial area of responsibility except in certain rather specific circumstances. These latter are listed in broad, general terms in section 2 of the Code where "federal work, undertaking or business" is defined.

Dickson, J, as he then was, wrote the following:

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but

only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd., [[1974] 1 Can LRB 20,] provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. As the Chairman of the Board phrased it, at pp.34-5:

'In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.'

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the 'normal or habitual activities' of that department as 'a going concern', and the practical and functional relationship of those activities to the core federal undertaking."

(pages 132-133; and 13-14)

The business in which Allcap is engaged, porter services, is certainly not per se within federal jurisdiction for the purpose of regulating its labour-management relations. On its face, and certainly in itself, that business of supplying porter services cannot be viewed readily as normally being work on or in connection with the operation

of "aerodromes, aircraft or a line of air transportation" (section 2 of the Code) as can such functions as aircraft mechanic, avionics technician, or aircraft maintenance employee. Porter services would be thought of primarily as falling within the provincial realm except where the circumstances were such as to suggest that they were related to a core federal undertaking in a "vital", "essential" or "integral" way. As we have suggested, there are core federal undertakings present - the airport and the airlines. The question to be answered: is the business, work and function of Allcap vital, essential or integral to one or other or both of these core federal undertakings. If it is, then Allcap is in federal jurisdiction; if it is not, the Board is without jurisdiction to deal with the section 80 reference.

It is not possible to turn to any particular sources to find any succinct definitions of the concepts of "vital", "essential" or "integral". Generally speaking, it is necessary to look at previous cases to see why other boards and courts have considered particular fact situations to be inside or outside these categories. For example, in Northern Telecom Canada Ltd. et al. v. Communications Workers of Canada et al.; [1983] 1 S.C.R. 733; and (1983), 147 D.L.R. (3d) 1, known as Telecom 2, the Supreme Court applied the tests set out in Telecom 1. It concluded that the work done by certain employees of Northern Telecom for Bell Canada, a federal core undertaking, was on the facts so integral to that federal core undertaking as to make the regulation of their labour relations federal as well.

Earlier in his reasons for decision in Reference re Eastern Canada Stevedoring Co. Ltd., [1955] S.C.R. 529, Rand, J suggested that the law appeared to be "if the subordinate matter is reasonably required for the purposes of the

principal" - assuming that the latter was in federal jurisdiction - then the "subordinate matter" would also be in federal jurisdiction.

The cases indicate clearly that the relationships of the "subsidiary operation" - to use the terminology of Telecom 1 - must fall well over the line into the vital, essential or integral category. It may be "reasonably incidental" and still not be a sufficiently "essential component" to fall into the category of becoming federal. The Federal Court of Appeal made this distinction in Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al., [1979] 2 F.C. 91; and (1979), 97 D.L.R. (3d) 38:

"... A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation..."

(pages 96-97; and 43; emphasis added)

There have been several decisions where functions which might seem to be on the periphery of the operation of airports, aircraft or airlines have been found to be vital, essential or integral and thus within federal jurisdiction. For example, in Re City of Kelowna and Canadian Union of Public Employees Local No. 338 (1974), 42 D.L.R. (3d) 754, the British Columbia Supreme Court found that although the municipality leased and operated the airport, the airport

as an operation was a core federal undertaking and persons doing runway maintenance work were engaged in functions essential to the operation of the airport.

In Butler Aviation of Canada Limited v. International Association of Machinists and Aerospace Workers, [1975] F.C. 590, the Federal Court of Appeal upheld a decision of this Board which found that employees who were engaged in refuelling, maintenance and avionics, ground handling, baggage handling and customer service functions for private and corporate aircraft using Montreal airport were within federal jurisdiction. These employees were not engaged by passengers to provide services to them, but were engaged by the pilots or owners of aircraft to provide services to passengers. Nor was their "baggage handling" in the nature of the functions performed by porters privately hired by the passengers. The court concluded that the employees' functions were an integral part of or necessarily incidental to an operation within federal legislative jurisdiction.

In Re Colonial Coach Lines Ltd. et al. and Ontario Highway Transport Board et al., [1967] 2 O.R. 25 (H.C.), Donohue J. decided that the airline bus service to and from Toronto International Airport was not in federal jurisdiction because it was not in the vital, essential or integral category. He said:

"...It seems clear to me at once that the transport of airline passengers and airline crew to and from Toronto Airport by Air Terminal Transport Ltd. is not reasonably required by Toronto Airport. Air Terminal Transport Ltd.'s service is no doubt a convenience to the public.... but it is without doubt the case that the airport could continue to function without the service..."

(page 31)

Very close to the case before us was Murray Hill Limousine Service Limited v. Sinclair Batson et al. (1965), 66 CLLC

14,143; and [1965] B.R. 778. The airlines had a contract with Murray Hill to provide porter services similar to those provided by Allcap at Pearson. The airlines, however, had a much greater concern about the on-going, proper provision of such services than is the situation now at Pearson. Moreover, they paid money to Murray Hill which was passed on in wages to the porters. The issue in this case was whether the porters were in provincial jurisdiction and thus could benefit from Quebec provincial employment standards. The Quebec Court of Queen's Bench, Appeal Side, found that they were. In his reasons, Taschereau, J said:

"...When a passenger bought his ticket he could require the company to have his baggage placed on the aircraft and have it brought off when he arrived at his destination. The duties of the airline company commenced, at departure, when baggage was entrusted to its employees at the baggage room. Their duties ceased, at arrival, when baggage was placed in Customs or in the baggage room. The passenger then had to claim it and carry it himself or engage the services of a porter for that purpose."

(pages 541-542; and 784)

His Lordship went on to say that the work performed "however useful it might be to airline companies and their passengers, was not an integral part of airline transportation any more than the restaurants, newsstands, hairdresser salons and bars installed in all large airports for the comfort and convenience of passengers".

IV

In the Board's opinion, both the nature of the functions performed by the employees of Allcap Baggage Services Inc. and the relationship of those functions to the airport and the airlines make it very difficult to characterize Allcap as vital, essential or integral to the airport and the

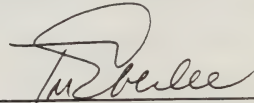
airlines. The functions are services which passengers utilize or not as their particular circumstances dictate. They may be essential to some passengers, particularly in the absence of sufficient baggage carts, but their essentiality is of roughly the same character and kind as that of various types of transportation to the airport. Some people can carry their own bags; some people can find a cart to push and thus convey their bags; some people need porters. Similarly some people have private cars to take them to the airport; some have access to public transportation; some require taxis. It is not suggested that because passengers find that public transportation or taxis are vital or essential or integral to their plans to get to the airport and then travel by airline that bus companies and taxis are vital, essential or integral to the airlines and thus come under federal jurisdiction.

Porter services are undoubtedly necessary for some passengers, but the evidence does not show that they are vital, essential or integral to the operation of the airport or the airlines. They are a convenience provided for the travelling public. Their actual relationship to the airport and to the airlines per se is not particularly close. The evidence suggests that they exist today only because Allcap's principals made a proposal which was acceptable and cost-free, not because the airport or the airlines actually needed the services in order to carry on their operations.

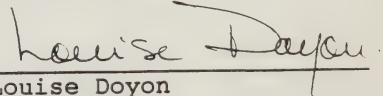
It is clear to us that the essentiality of the porter services, to the travelling public, is of roughly the same level as the essentiality of the snack bars within the terminal. That is not to say that for many people, in particular circumstances, they are not essential; but they have never been considered sufficiently essential to the

operation of the airport or the airlines to exempt them from the normal rule that they fall under provincial jurisdiction. (When one bears in mind that the C.L.R.B. has already decided in Baron W. Lewers (1982), 48 di 83; and 82 CLLC 16,179 (CLRB no. 372), that a catering operation preparing meals for consumption by passengers on actual airline flights is not within federal jurisdiction, it would be exceedingly difficult for us to find a rationale to bring airport snack bars - which are at least one step removed from actual airline flight operations - under federal jurisdiction.)

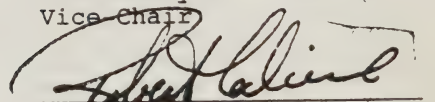
Bearing in mind what the parties have been through, believing that they were regulated by the federal authority - the certification application, the unfair labour practices adjudication, a lengthy period of collective bargaining - this Board has to acknowledge that this particular exercise affords it no pleasure. However, the facts of the situation cannot be ignored and they point us directly to the conclusion that Allcap Baggage Services Inc. is not a federal work, undertaking or business and we are therefore unable to deal with the Minister's reference under section 80. A further consequence is that the certification order issued on September 6, 1988 must now be deemed to be of no force and effect.



Thomas M. Eberlee
Vice-Chairman



Louise Doyon
Vice-Chair



Robert Cadieux
Member of the Board

DATED at Ottawa this 25th day of January 1990.

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Summary

The Syndicat des employés(ees) de
l'ingénierie de Télévision Quatre
Saisons Inc. (FNC-CNTU), applicant,
and Réseau de Télévision Quatre
Saisons Inc., employer.

Board File: 555-2928

Decision no.: 779

Résumé de décision

Le Syndicat des employés(ees) de
l'ingénierie de Télévision Quatre
Saisons (FNC-CSN), requérant, et
Réseau de Télévision Quatre Saisons
Inc., employeur.

Dossier du Conseil: 555-2928

Décision n°: 779

Application for certification.
Section 24 of the Canada Labour
Code. Section 15(o). The employer
requested access to membership
evidence. The Board refused to
grant access pursuant to section
28 of its Regulations. Employer's
argument as to the invalidity of
section 28 of the CLRB Regulations.

The Board concluded that section
28 of its Regulations outlining the
principle of non-disclosure of
membership evidence complies with
section 15(o) of Part I and is in
keeping with the objectives of the
Code, including the exercise of the
freedom of association.

Demande d'accréditation. Article
24 du Code canadien du travail.
Alinéa 15o). L'employeur a demandé
d'avoir accès à la preuve des
adhésions syndicales. Refus du
Conseil en vertu de l'article 28
du Règlement du CCRT. Argument de
l'employeur alléguant l'invalidité
de l'article 28 du Règlement du
Conseil.

Le Conseil a jugé que l'article 28
du Règlement énonçant le principe
de la non-divulgence de la preuve
des adhésions syndicales respecte
le cadre imposé par l'alinéa 15o)
de la Partie I et s'inscrit dans
les objectifs du Code dont celui
d'assurer l'exercice de la liberté
d'association.

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| Canada |
| Labour |
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| Canadien des |
| Relations du |
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Reasons for decision

The Syndicat des employés(ées)
de l'ingénierie de Télévision
Quatre Saisons (FNC-CNTU),

applicant,

and

Réseau de Télévision Quatre
Saisons Inc.,

employer.

Board File: 555-2928

The Board was composed of Mr. Serge Brault, Vice-Chairman,
as well as Ms. Ginette Gosselin and Mr. Jacques Alary,
Members.

Appearances:

Mr. Daniel Carrier, for the applicant; and

Mr. Luc Beaulieu, for the employer.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

On December 7, 1989, this panel granted an application for
certification filed by the Syndicat des employés(ées) de
l'ingénierie de Télévision Quatre Saisons and issued a
certification order in a letter dated December 11, 1989.
At that time, the Board dismissed on the merits the written
representations submitted by the employer, alleging that
section 28 of the Canada Labour Relations Board Regulations
(1978), C.R.C. 1014, as amended by SOR 89-82, was invalid.
We informed the parties that they would be given reasons

explaining this aspect of our decision at a later date. These reasons are outlined below.

II

Pursuant to section 15 of the Canada Labour Code (Part I - Industrial Relations) (formerly section 117, Part V), the Board may make regulations of general application respecting various matters, including:

"15.(o) the circumstances in which evidence referred to in paragraph (m) may be received by the Board as evidence that any employees wish or do not wish to have a particular trade union represent them as their bargaining agent, including the circumstances in which the evidence so received by the Board may not be made public by the Board; ..."

It is in exercising this regulatory authority that the Board adopted section 28 of its Regulations in 1978.

Section 28 of the Regulations reads as follow:

"28. Evidence presented to the Board in respect of:

(a) the membership of any employees in a trade union,

(b) any objection by employees to the certification of a trade union, or

(c) any signification by employees that they no longer wish to be represented by a trade union

shall not be made public by the Board unless the Board is of the opinion that disclosure would be in furtherance of the purposes and intent of the Code or its administration."

The issue of the validity of section 28 of the Regulations arose when the employer requested, in its response dated April 18, 1989, that the Board officer provide evidence of the employees' union membership on file and produced by the

union. On April 20, the Board refused to disclose this information, invoking section 28 of its Regulations.

In other written representations submitted to the Board, the employer again requested access to membership evidence, alleging that section 28 of the Regulations was null and void and that section 15(o) of Part I was unconstitutional.

According to the employer, section 28 of the Regulations was null and void because it was vague and granted discretionary power.

III

After examining and analyzing the employer's representations, the Board deems them to be unfounded.

Unlike the legislatures of Quebec and Manitoba, Parliament has not statutorily barred the employer from the investigation process regarding union support. Rather, it has delegated discretionary power to the Board to make regulations defining cases where membership evidence cannot be disclosed. This is the meaning and scope of section 15(o) of the Code.

It is in exercising this discretion while considering the objectives of the Code that the Board adopted section 28 of the Regulations. Membership evidence generally cannot be disclosed except in furtherance of the purposes of the Code. In other words, far from reproducing the wording of section 15(o) of Part I and thus granting itself pure discretionary power, the Board fully exercised its regulatory authority by clearly establishing the principle of non-disclosure of membership evidence.

This general standard of non-disclosure of membership evidence is not vague. Any reasonable person can understand the meaning of section 28 of the Regulations and govern himself or herself accordingly.

Finally, in addition to complying with the framework imposed by section 15(o) of Part I, section 28 of the Regulations complies with the spirit and objectives of the Code, which include ensuring the free exercise of freedom of association. It is a well-known fact that there is a great temptation for employers to treat employees who are members of a union differently from those who are not. This was not Parliament's intention. The Board's decisions are full of such cases. The principle of confidentiality is precisely designed to prevent unfair practices and to reassure employees that they may, without fear, exercise their fundamental right to be members of a union.

In this case, the employer submitted no evidence demonstrating that the objectives of the Code would be furthered by giving it access to this otherwise confidential information. Such access was consequently denied.

In closing, the employer withdrew its allegation that section 15(o) of Part I was unconstitutional in view of section 7 of the Canadian Charter of Rights and Freedoms:

"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Since the Supreme Court of Canada judgment in The Attorney General of Quebec v. Irwin Toy Limited et al., [1989] 1 S.C.R. 927, it has been clear that companies or corporations

cannot invoke the constitutional protection of section 7 of the Charter. This undoubtedly explains the employer's decision to abandon this argument.

Serge Brault

Serge Brault
Vice-Chairman

G. Gosselin

Ginette Gosselin
Member of the Board

Jacques Alary

Jacques Alary
Member of the Board

DATED at Ottawa, this 29th day of January 1990.

CCRT/CLRB - 779

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SUMMARY

Transport Drivers, Warehousemen and General Workers' Union, Local 106, complainant union, Ganeca Transport Inc., Saint-Hyacinthe, Quebec, respondent employer, and Le Syndicat des employés du Transport Ganeca (BSQ) Inc., mis-en-cause union.

Board Files: 745-3384
555-2991
555-3002

Decision No.: 780

RESUME

L'Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, section locale 106, syndicat plaignant, Ganeca Transport Inc., Saint-Hyacinthe (Québec), employeur intimé, et Le Syndicat des employés du Transport Ganeca (BSQ) Inc., syndicat mis-en-cause.

Dossiers du Conseil: 745-3384
555-2991
555-3002

N° de décision: 780

In a letter decision, Ganeca Transport Inc., December 12, 1989 (LD 769), the Board upheld the complaint of unfair labour practice filed by the complainant union alleging that the employer had contravened sections 94(1)(a), 94(3)(a) and 96 of the Code. That decision also dealt with two applications for certification.

These reasons for decision follow that interim decision. The Board determined that Ganeca Transport Inc. had breached the strict neutrality rule that is required of an employer when its employees decide to choose a bargaining agent. In this case, the employer had interfered, directly or through its representatives, with the freedom of choice of its employees.

Dans une décision-lettre, Ganeca Transport Inc., 12 décembre 1989 (LD 769), le Conseil maintenait la plainte de pratique déloyale présentée par le syndicat plaignant alléguant que l'employeur avait contrevenu aux alinéas 94(1)a) et 94(3)a) ainsi qu'à l'article 96 du Code. Cette décision statuait également sur deux demandes d'accréditation.

Les présents motifs font suite à cette décision partielle. Le Conseil a décidé que Ganeca Transport Inc. avait enfreint la règle de stricte neutralité exigée d'un employeur lorsque ses employés décident de se choisir un agent négociateur. Dans le cas présent, l'employeur est intervenu, directement ou par l'intermédiaire de ses représentants, dans le libre choix de ses employés.



The employer had communicated with its employees in a way that was prohibited by the Code. Furthermore, it had interfered with the formation or administration of the mis-en-cause union, by participating directly in the solicitation of union memberships. The Board did not recognize the mis-en-cause union as an organization of employees within the meaning of the Code and dismissed the application for certification it had filed. The complainant union was certified.

Il a entretenu avec ses employés un type de communications qui est prohibé par le Code. Il est de plus intervenu dans la formation et l'administration du syndicat mis-en-cause, en participant directement à la sollicitation d'adhésions pour ce syndicat. Le Conseil n'a pas reconnu au syndicat mis-en-cause le statut d'association d'employés au sens du Code et a rejeté la demande d'accréditation que celui-ci avait présentée. Le syndicat plaignant a été accrédité.

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Reasons for decision

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Transport Drivers,
Warehousemen and General
Workers' Union, Local 106,

complainant union,

and

Ganeca Transport Inc.,
Saint-Hyacinthe, Quebec,

respondent employer,

and

Syndicat des employés du
Transport Ganeca (BSQ) Inc.,

mis-en-cause union,

Board Files: 745-3384
555-2991
555-3002

The Board was composed of Ms. Louise Doyon, Vice-Chair, and
Mr. Victor E. Gannon and Ms. Evelyn Bourassa, Members.

Appearances:

Mr. Marco Gaggino, for the union;

Messrs. Robert Legris and Pierre Séguin, for the employer;
and

Mr. Lucien Tremblay, for the mis-en-cause.

These reasons for decision were written by Ms. Louise Doyon,
Vice-Chair. They are further to an interim decision dated
December 12, 1989 allowing the complainant union's complaint
of unfair labour practice and dealt with two applications
for certification filed by the unions to the present
proceeding. The Board informed the parties at the time that
they would receive its detailed reasons for decision later.
This document constitutes those reasons.

I

The Remedy

This complaint of unfair labour practice alleges that Ganeca Transport Inc. (the respondent) contravened sections 94(1)(a), 94(3)(a) and 96 of the Canada Labour Code (Part I - Industrial Relations), which read as follows:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

The complainant alleges that the respondent contravened these provisions.

1. It made threats and used intimidation by stating that if the complainant were certified, this would create a barrier between the employees and the company and would put an end to friendly discussion, that in the event of a strike, the company would lose its contracts and the employees' employment would be terminated, and that the company would never negotiate with the president of the complainant union.

2. It interfered with the formation of a rival union, the Syndicat des employés du Transport Ganeca (BSQ) Inc. (the mis-en-cause), by allowing employees to sign membership cards in this union in the work place during working hours and by providing its assistance, or that of its representatives, in establishing this union.

The complaint was filed with the Board on October 17, 1989. At the time, the Board had before it two applications for certification. The first was filed on August 21, 1989 by the Transport Drivers, Warehousemen and General Workers' Union, Local 106, the complainant in this case, seeking to represent:

"All drivers within the meaning of the Labour Code, excluding mechanics, office staff and those automatically excluded under the Code."

(translation)

The second application for certification was filed on September 5, 1989 by the Syndicat des employés du Transport Ganeca (BSQ) Inc., seeking to represent:

"All truck drivers and mechanics, excluding office employees, sales representatives and other employees excluded by the Labour Code employed by Ganeca Transport Inc., 7600 Duplessis, Saint-Hyacinthe, QC, J2S 8B1."

(translation)

On October 5, 1989, the Board ordered a representation vote to enable employees to choose between these two unions. This vote was held on November 4, 1989. After this complaint was made, the Board ordered that the ballot boxes be sealed until it disposed of the complaint. The Syndicat des employés du Transport Ganeca (BSQ) Inc. was impleaded in the present proceeding.

It is against this background that the Board heard the parties in Longueuil on November 20, 21 and 22, 1989.

II

The Evidence

The complainant and the respondent each presented evidence. The mis-en-cause presented no evidence. In the Board's opinion, conclusive proof was adduced to support the allegation that the respondent committed unfair labour practices.

Two events in particular substantiate this finding: the meeting of August 26, 1989 called by the employer and the conduct of the mis-en-cause union's organizing campaign.

I - The Meeting of August 26, 1989

On Tuesday, August 22, 1989, Mr. Emilien Letarte, president of the respondent company, called a meeting of all drivers through a notice distributed with their pay cheques. This notice read as follows:

"Attention all drivers:

This is to inform you that an information meeting will be held on SATURDAY, AUGUST 26, 1989, in Saint-Hyacinthe, at 10:00 a.m.

The purpose of this meeting is to answer all your questions or address any doubts that you may have.

Thank you for your attention.

Emilien."

(translation)

This "information meeting" did take place on Saturday, August 26, 1989 in the company's offices in Saint-Hyacinthe. Detailed evidence was adduced concerning the events leading

to the calling and holding of this meeting, and it is appropriate to examine the chronology of these events.

1. On Saturday, August 19, the complainant union held a meeting attended by a majority of the employer's drivers. They decided at this meeting to join this union and file an application for certification, which was made on August 21, 1989. At this meeting, some drivers challenged the decision to join the complainant union. This disagreement, however, did not give rise to threats or intimidation by either side, although each held to its position.
2. Mr. André Vallerand, a driver, stated that on Sunday, August 20, 1989, Mr. Jean-Marie Pitre, a dispatcher, said to him, in the yard of Ganeca Transport, that some of the guys had signed cards.
3. On August 21 or 22, 1989, Emilien Letarte met in his office with two drivers, Luc Beauregard and André Richard. He told them he was aware they had signed a membership card in the complainant union and asked them what was the problem and what the guys wanted. Luc Beauregard had been an employee representative since April 1989. We will have more to say later concerning the events that led to Mr. Beauregard's becoming this representative.
4. On Friday, August 25, 1989, late in the morning, the employer received a copy of the application for certification filed on August 21, 1989. It was Nicole Fontaine, Mr. Letarte's secretary, who opened the mail and gave him a copy of the document. She stated that it was her understanding, on seeing this document, that it was an application for certification

whose success depended on obtaining the membership of the majority of drivers. She added that she had never seen an application for certification and did not know the rules governing this type of procedure.

At the beginning of the afternoon of August 25, Mr. Letarte contacted his lawyer to discuss the situation, namely, the existence of an application for certification and the holding of the meeting called for the following day. According to Mr. Letarte's testimony, his lawyer essentially said that he could hold the meeting but that he could not speak. His lawyer apparently was not very specific about what subjects he could or could not discuss. However, Mr. Letarte understood that he could not talk about the union or working conditions. The latter subject, which included the cent/mile increase due on September 1, 1989, had to be negotiated with the association. Mr. Letarte made a report to Ms. Fontaine on his conversation with his lawyer. Finally, after debating whether or not he should cancel the meeting scheduled for August 26, 1989, he decided to hold it because he is a man who normally keeps his word. Moreover, under cross-examination, he explained that he saw no reason to cancel this meeting to deal with matters arising from the meeting on April 1, 1989. Moreover, he said that he was expecting the application for certification because he knew there was still some dissatisfaction as a result of the April 1st meeting.

It is appropriate at this point to relate certain events that affected relations between the employer and its drivers between April and August 1989, in particular the meeting of April 1. Mr. Letarte had called this meeting, which was intended as a social gathering, specifically to meet the new

drivers. However, according to Mr. Letarte, the meeting turned sour as soon as it began.

The evidence shows that prior to this meeting, the drivers had agreed on the demands that were to be firmly put to the employer. From the outset, there was disagreement over the increase in mileage compensation. The drivers then left the meeting and subsequently returned with their demands in writing. They demanded, among other things, that no reprisals be taken against the drivers in connection with these negotiations; otherwise, there would be a walkout.

Finally, an agreement was reached, among other things, on mileage compensation. It was at this meeting that three employees, including Luc Beauregard, were named to represent the drivers. Their mandate was to work out with the employer details of the agreement on working conditions and to try and settle the specific problems that might arise from time to time between the employer and the drivers. A document outlining the principal working conditions, accompanied by the company's directives was given to the drivers on May 18, 1989. However, one major issue remained to be resolved between the parties: the unpaid waiting periods during trips made to certain customers. Sometimes these waiting periods were numerous, totalling five to six hours, and the drivers were demanding to be paid for these periods. Moreover, during June and July, the employer, through its representatives, apparently stopped supplying cleaning products for the trucks. This action created a great deal of dissatisfaction among the drivers. Luc Beauregard testified that he told Mr. Letarte of the drivers' feelings concerning this matter.

It is against this background that the complainant union conducted its organizing campaign. The evidence shows that

an initial meeting with the Local 106 representative was held in July 1989, but no decision to unionize was made at this time. As stated earlier, a majority of drivers finally decided to join the ranks of this union on August 19.

5. Almost all of the drivers attended the meeting of August 26, 1989. They were not paid for the time taken up by the meeting. Nicole Fontaine, Mr. Letarte's secretary, Ms. Beaudoin, an office employee, and Mr. Jean-Marie Pitre, a dispatcher, accompanied Mr. Letarte to the meeting.

The significant events of this meeting can be summarized as follows.

- (a) The meeting began at 10:00 a.m. and ended around 12:30 p.m.
- (b) Mr. Letarte began by explaining that he had not cancelled the meeting because it had already been scheduled, but that he could not speak and that the drivers could return home. However, he asked them what the problem was.
- (c) The discussion then began, with several people talking at the same time. It dealt principally with the contentious issues: unpaid waiting periods and the refusal to pay for cleaning products. Luc Beauregard intervened to describe the state of affairs to the employer.
- (d) Several people expressed opinions on and spoke about the filing of the application for certification by the complainant union and the effect it would have on relations between the

employer and drivers. Although Mr. Letarte claimed that he could say nothing because of this application, he spoke on a number of subjects.

- (e) Regarding waiting periods, Mr. Letarte said that if the union came in, this matter would have to be negotiated. This would result in the loss of contracts, thereby leading to terminations of employment and lay-offs. He stated that he would not negotiate with that union.
- (f) Regarding the cent/mile increase effective September 1, 1989, Mr. Letarte said that he did not know whether he could grant it now that the application for certification had been filed.
- (g) At one point, given the turn that the discussions were taking, an employee proposed that the drivers adjourn to the garage to hold discussions among themselves. They withdrew and were absent from the meeting for some 30 to 45 minutes.
- (h) The discussion continued in the garage and it was agreed, at the suggestion of Jean-Guy Boisvert, that a vote be taken to choose between the complainant union and a company union. Some drivers suggested establishing a company union because, in their words, "it was better to keep to ourselves" and they could "give the employer another chance."

A vote by show of hands proved unsuccessful and a secret vote was taken. The vote was in favour of the company union. A committee of three representatives, Jean-Guy Boisvert, Steve Campbell

and Luc Beauregard, was formed. Commenting on the results of the vote, a witness said that "the guys were afraid because of lay-offs" ... "When you've got a family and kids to support ..."

- (i) At the suggestion of Jean-Guy Boisvert, it was agreed to ask Mr. Letarte, in view of the results of the vote, to wipe the slate clean, i.e. remove from the drivers' personal files all notices, reprimands or other similar information. Luc Beauregard was given this task.

It was also in the garage that Jean-Guy Boisvert stated that he knew someone who could get rid of the complainant union.

- (j) The drivers returned to the meeting, and before Luc Beauregard even had a chance to convey the request concerning the files, Mr. Letarte offered to wipe the slate clean. He appeared satisfied with the turn of events and hoped that the situation could return to normal.
- (k) The meeting continued a while longer, without any decision being taken regarding the unpaid waiting periods. As for the question of the cleaning products, Mr. Letarte said that he would see what he could do.
- (l) At the end of the meeting, Mr. Letarte invited the drivers to have a beer. Contrary to what normally happened at these meetings, Mr. Letarte did not offer them lunch. According to Mr. Letarte, it was at that point that Messrs. Boisvert and Campbell asked him if he knew the procedure for

establishing a company union. He said that he knew nothing about it.

Mr. Letarte denied at the hearing that he had discussed on August 26, 1989 the possible closing of the business if he had to negotiate unpaid waiting hours. He also denied that there was any discussion of clean files. According to him, these subjects were discussed at the meeting on April 1, 1989. He and Ms. Fontaine were the only two witnesses to testify to this effect. All the other witnesses, including the drivers called by the respondent, stated that these remarks were made on August 26.

II - The Mis-en-Cause Union's Organizing Campaign

The mis-en-cause union's organizing campaign took place during the week of August 28, 1989. An application for certification was made on September 5, 1989 to represent the group of drivers and mechanics employed by Ganeca Transport.

The events relating to the conduct of this organizing campaign are as follows:

1. On Monday morning, August 28, 1989, Denis Lachapelle, a driver, met with Jean-Guy Boisvert in his truck, during working hours. Mr. Boisvert gave him cards bearing the name of the Syndicat des employés du Transport Ganeca (BSQ) Inc. and asked him to have the drivers he met during the week sign them. Mr. Boisvert also explained to him that he had met the "head of that," in this case Lucien Tremblay, that as members of this union, the drivers would bargain for themselves, and that if they had any grievances, they would settle them themselves. Mr. Lachapelle explained to the Board that the argument used to sign up members

in the independent union was that they would continue to operate as before. For example, an employee could go into Mr. Letarte's office and settle his problems, himself.

Mr. Lachapelle then met with another driver, Gaétan Carignan, gave him some cards and asked him to obtain signatures.

2. At the time, Mr. Lachapelle was assigned to long hauls, which meant that he was regularly absent during the week. For this reason, he asked Nicole Fontaine, Mr. Letarte's secretary, to do him a favour and obtain the signatures on membership cards of certain drivers she would no doubt see during the week. He therefore gave her, in her office, during working hours, a list of six names and six membership cards.

Ms. Fontaine was to ask these drivers if they wanted to join the union, have them sign a membership card, obtain payment of dues and then return the cards and dues to Mr. Lachapelle. Mr. Lachapelle was not afraid of Mr. Letarte's knowing that he belonged to the union and was surprised when questioned about this matter.

3. Ms. Fontaine testified that she had agreed to help Mr. Lachapelle, with whom she got along well. She agreed to obtain signatures or take steps to this end during her working hours. She asked the drivers if they wanted to join the company union, explaining that this was the union formed by the employees and that they themselves, and not "the others," were going to run it. She was not afraid of being reprimanded by her employer because Mr. Letarte was not aware of her actions. However, she admitted that Mr. Letarte could

have learned of the situation at any time because his office was within a few metres of hers. Ms. Fontaine added that she acted openly and that she spoke to the drivers in a normal tone of voice when she was in her office.

4. Two drivers signed their cards in Ms. Fontaine's office during working hours. One was surprised that it was Ms. Fontaine who had approached him. Even after he was given more information, he still did not understand what Ms. Fontaine had to do with this union. This driver did not attend the meeting on August 26. A third driver signed around 10:30 p.m. or 11:00 p.m. on Wednesday evening, August 31, 1989, after Ms. Fontaine had solicited him by telephone that afternoon. He was in Toronto at the time. Since he was going on holidays the following day, Ms. Fontaine asked him to telephone her at her home that evening, as soon as he returned to Saint-Hyacinthe, and told him that she would meet him at Ganeca Transport and have him sign a membership card, which she did.

A fourth driver signed a membership card at his home in Longueuil. Ms. Fontaine telephoned him to explain what was involved, and since he was ill, she told him that she would send someone. At Ms. Fontaine's request, the company's replacement driver drove to Longueuil, during his working hours, in a company vehicle, to have this driver sign a membership card.

Finally, two drivers solicited by Ms. Fontaine did not sign membership cards. However, one of the two stated that he signed a card later when Steve Campbell pointed out to him that he had "had problems with the office" in the past and that signing a card could help him.

5. On Saturday, September 2, the mis-en-cause union held a meeting. Since Jean-Guy Boisvert could not attend, he asked Denis Lachapelle to attend in his place. Lucien Tremblay was present and was supposed to be presented with the signed membership cards. At this meeting, Mr. Lachapelle was elected union president and the two other drivers who accompanied him were elected to the executive committee. There were only three participants at the meeting. An application for certification was filed on September 5, 1989, as stated earlier.

The evidence also showed that Nicole Fontaine serves, to all intents and purposes, as the company's office manager and assistant to Mr. Letarte. She knows the drivers well and has access to their personal files. If they have questions or problems to settle, they see her. In this sense, she exercises real authority. Similarly, if Ms. Beaudoin, the office employee, or Mr. Pitre, the dispatcher, have problems or questions concerning their work, they consult Ms. Fontaine.

Mr. Letarte testified that he first learned of Ms. Fontaine's actions in connection with the signing of membership cards in the mis-en-cause union when the present complaint was filed around October 6, 1989. At that point, he determined whether she had played an "active" part, whether she had pressed the matter with the drivers or had pressured them because, he said, she has some authority. When she answered no to his questions, he took no punitive action against her because, in his words, "everyone is entitled to make a mistake." However, he warned her not to resume these activities.

On the morning of November 4, 1989, the date of the representation vote organized by the Board for the purpose of choosing between the complainant and the mis-en-cause, Mr. Letarte said the following prior to the vote, in the presence of Michel Charette and three other drivers: "We'll know this morning whether we stay open or whether we close." Ms. Fontaine served as scrutineer for the employer.

III

The Law

I - The Code

Under sections 94(1)(a), 94(3)(a) and 96 of the Code (page 2), an employer is prohibited from interfering with, in whatever manner, directly or through its representatives, the formation or administration of an employee association and with the decision by its employees to become or not to become members of an employee association.

The Board has repeatedly interpreted these provisions. Its decisions in this area have established criteria and rules for determining the legality of an employer's conduct in these matters.

In the present case, the evidence heard establishes that the employer contravened the provisions of the Code in that it did not abide by the rule of neutrality that it is required to observe in such circumstances, namely, that an employer must refrain from interfering with the choice of a bargaining agent by its employees. Ganeca Transport first breached this rule by carrying on with its employees a type of communication that is prohibited. It also breached this rule by interfering directly with the establishment of the

mis-en-cause union. The Board feels it appropriate, before examining how the actions taken by the employer in the present case contravened the Code, to review briefly its past decisions.

II - Past Decisions

1. Neutrality

The first rule established by the Board on this question governs, in a general way, the employer's behaviour: an employer must adopt an attitude of strict neutrality when its employees decide to begin an organizing campaign and eventually join the employee association of their choice.

In Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,001 (CLRB no. 173), the Board said the following:

"Neutrality is a characteristic we urge on employers when it involves matters of employee exercise of rights under the Code. ..."

(pages 674; 283; and 352)

In another decision rendered shortly thereafter, the Board repeated this rule in these terms:

"In judging the actions of an employer during a union organizing campaign among its employees, the test is to what extent, if any, the employer departs from a stance of strict neutrality. What is prohibited by the Code is the employer's exercise of its privileged position in relation to its employees in attempting to influence their free exercise of their right to be represented by a bargaining agent of their choice. ..."

(General Aviation Services Limited (1979), 34 di 791; and [1979] 2 Can LRBR 98 (CLRB no. 182), pages 795; and 102)

This stance of neutrality imposed on the employer is designed to protect and preserve the association's independence from the employer. The Board dealt with this question in Télévision Saint-François Inc. (1981), 43 di 175 (CLRB no. 306):

"This independence of the union from the employer must appear from the beginning of the process of unionization undertaken by the employees when they sign a membership card. In fact, the prohibition against the interference set out in paragraph 184(1)(a) of the Code is directly related to the employees' right to freely decide whether or not to join the union of their choice, which requires the employer to remain strictly neutral and refrain from conducting a campaign for or against a union ..."

(page 188)

2. Prohibited Communications

This general rule of neutrality required of an employer whose employees have decided to organize collectively has, moreover, led the Board to consider the type of communications that an employer can carry on with its employees in such circumstances. In other words, what are "permissible communications" between an employer and its employees in such circumstances?

Bearing in mind that a union organizing campaign must not prevent the employer from continuing to administer and operate its business, the Board has therefore established the following principle:

"The employer's right to communicate with its employees must be strictly limited to the conduct of the business. The employer is only permitted to respond to unequivocal and identifiable, adversarial or libellous statements; by this we do not consider as being adversarial the fact that an employee wishes or does not wish to join a union. In the light of this background, employer's communications are to be permitted inasmuch as they are related to the efficient operation of the business. If they are not, then they must be viewed as a participation or interference in the representation of employees by a trade union and thus in contravention of Section 184(1)(a)."

(American Airlines Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRBR no. 301), pages 133; and 105; emphasis added)

The Board had the following to say on the same subject in Bank of Montreal (Bank and Cecil Streets Branch, Ottawa) (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRBR no. 518):

"The point of departure for previous Board decisions is that, however much an employer may feel that his unfettered right to manage and to maximize his profits may be modified if his employees choose to give up the making of individual contracts of employment and decide to switch to collective bargaining and collective agreements, it is basically not his business what they want to do. Above all, it is contrary to law if he places pressure on them to dissuade them from making such a decision. It would be naive in the extreme, of course, to believe that the law can make employers accept with equanimity the change in the balance of power that unionization usually brings about. But it can, and is designed to, deter employers from overt behaviour that would coerce or intimidate employees into not implementing their right to associate in accordance with the scheme of the Canada Labour Code.

Occasionally, such behaviour takes the form of dismissals or other similarly heavy-handed reactions to a prospective diminution of bargaining power. But it can also take the form of communications. Statements to employees can interfere quite effectively with the formation of a trade union or can leave persons with a real sense that they will suffer unhappy consequences if they join or form a union.

Obviously, as the Board has made clear in previous decisions, an employer cannot be expected to stop communicating with his employees simply because some are engaging in union organizing activity. Normal business communication is unaffected by the provisions of the Code which have been cited earlier. Nor do they constitute an attempt to control the expression of opinion on unions and collective bargaining by an employer anywhere outside the narrow and specific context implicit in their language. It is valid to hypothesize that these provisions would not act as a bar to an employer responding fairly to unsolicited employee questions about unions or answering publicly and appropriately any propaganda that might be directed against him by union organizers. But there is nothing in the Code which suggests that an employer should be or may be a party to the employees' actual decision-making process about forming or not forming a union and everything to suggest that he should maintain a neutral and hands-off stance while the employees determine their destiny themselves free of employer pressures."

(pages 101-102; and 147-148; emphasis added)

As the Board pointed out in this case, statements made by an employer to its employees during a union organizing campaign have a not inconsiderable impact and significance. In this regard, it repeated what it said earlier in Bank of Nova Scotia (Selkirk, Manitoba) (1978), 27 di 690; and [1978] 1 Can LRBR 544 (CLRB no. 123):

"... The scope of permissible employer communication to employees about employment relations matters and union affairs at the time of discussion among employees about exercising their right to be represented by a union is necessarily limited. Words from an employer have an impact that is far more personal and immediate than those from politicians or many others who affect an employee's life. A threat or a promise, no matter how veiled, is quickly translated by an employee into tangible consequences that can have a serious and readily perceived cost to the employee. To minimize and discourage this trauma for employees and promote an environment where employees can and do feel confident their right under section 110 is real, the Board in administering sections 184 and 186 places rigid limitations on employer communications."

(pages 698-699; and 551; emphasis added)

This then means that in situations where the nature of the communications an employer carries on with its employees is questioned, the Board will closely examine not only the content of these communications, but also the general context in which they occur.

For example, it will pay particular attention to the reasons for and the content and conduct of meetings called by the employer (see Nationair (Nolisair) International Inc.) (1986), 67 di 217 (CLRB no. 596); Can-Coast Marine Inc. (1987), 68 di 165 (CLRB no. 610); and Brewster Transport Company Ltd. (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574)). Similarly, the Board will examine generally the various aspects of an employer's conduct where two associations are seeking the support of its employees, in order to determine whether this conduct constitutes a

contravention of the unfair labour practice provisions (see Graham Cable TV/FM (1986), 67 di 57; 14 CLRBR (NS) 250; and 86 CLLC 16,047 (CLRB no. 588)).

IV

The Decision

Having regard to the preceding rules and criteria, the Board is satisfied that, on the whole, the employer, as represented by Emilien Letarte and Nicole Fontaine, displayed conduct, took actions and adopted a stance that are contrary to the provisions of the Code. These actions constitute interference with the formation and administration of an employee association and with the free exercise by the employees of their right of association.

1. The meeting of August 26, 1989

Based on relevant evidence, the Board does not accept the explanation given by Mr. Letarte to justify holding the August 26, 1989 meeting. He gave differing versions: the meeting was called to resolve issues arising from the April 1, 1989 meeting; the meeting was a friendly social gathering; the meeting was called to "answer all your questions or address any doubts that you may have" (see text of the notice of meeting quoted at page 4). None of these explanations have convinced the Board of his credibility.

Similarly, the Board does not accept the reasons given by Mr. Letarte for refusing to cancel the meeting of August 26, 1989, once he had been advised of the filing of the complainant's application for certification. If, as Mr. Letarte claims, he could not speak once this application for certification had been filed, common sense dictated that

he cancel the meeting, which he was perfectly capable of doing as early as Friday afternoon. The Board believes on the contrary that Mr. Letarte deliberately chose to hold this meeting knowing that his attitude ("I cannot speak, but ...") would create a climate of confusion, uncertainty and doubt in the minds of his employees concerning the operation of the business, their working conditions and the consequences of joining or not joining a union in these circumstances. This is precisely what happened.

The conduct of this meeting and the remarks made by Mr. Letarte constitute the threats and intimidation that are prohibited by the Code. His remarks concerning the application for certification and its impact on his right to pay the cent/mile effective September 1, 1989 (the matter discussed at the stormy meeting of April 1), his comments regarding the possibility of paying employees for waiting periods and the resulting loss of contracts and, finally, his statement that he might refuse to negotiate with the president of the complainant union, are irrefutable proof of these threats and intimidation.

Moreover, the nature and significance of the discussions held by the drivers in the garage, when they abandoned the idea of being represented by the complainant union and opted for a company union do not appear to the Board to be entirely innocent. The question of the clean records is one example. Why did Mr. Boisvert suggest in the garage that the drivers ask the employer to wipe the slate clean and why, after the employees returned to the meeting, did he make this proposal, even before Mr. Beauregard had time to speak? This coincidence suggests to the Board that Messrs. Boisvert and Letarte had discussed this matter beforehand. In this regard, it should be remembered that it was Mr. Boisvert who proposed the company union, who said

that he knew how to get rid of the Teamsters, who asked Mr. Letarte if he knew the procedure for forming a company union and, finally, who, on Monday morning, August 28, was in possession of union membership cards bearing the name of the mis-en-cause union.

All these facts merely strengthen the Board's belief that the employer intervened to put undue pressure on its employees by placing them in a situation where any reasonable person could not help but make a connection, negative of course, between his joining a union, the possible difficulties for the company and the deterioration of his working conditions. Such conduct contravenes the Code and the respondent employer is guilty of such conduct.

2. The Organizing Campaign of the Mis-en-Cause Union

Another factor persuaded the Board that the complaint has merit: the role Nicole Fontaine, Mr. Letarte's secretary, played in the signing of membership cards in the mis-en-cause union.

Ms. Fontaine's authority as an employee of the company is clear: she is Mr. Letarte's assistant and is regarded by the employees as the employer's representative.

Her direct intervention in soliciting employees, her determining to sign up certain employees and the means she used to this end are all further evidence of direct interference with the formation and administration of an employee association.

The Board does not believe that Ms. Fontaine acted innocently, unaware of the significance and impact of her actions. Nor does the Board believe that Mr. Letarte was

unaware of what Ms. Fontaine was doing. The evidence in this regard is overwhelming: she acted openly, to everyone's knowledge, without concealing, or even trying to conceal, her actions, even though her office was within Mr. Letarte's earshot. To ask the Board to believe that Mr. Letarte did not know that Ms. Fontaine was playing an active role in the establishment of the mis-en-cause union defies common sense. Moreover, their presence at the meeting on August 26 strengthens our belief that they acted in concert.

Consequently, there is no doubt that the employer and its representative, Ms. Fontaine, directly and indirectly promoted the establishment of the mis-en-cause union by allowing it to sign up enough employees to file an application for certification.

V

Orders and Remedies

In closing, the Board must now examine the consequences for the mis-en-cause union of the employer's interfering in its internal affairs.

The evidence showed that the employer actively participated in the establishment of this union and that this union did not object. On the contrary, it sought and obtained the help of Ms. Fontaine and benefited, at least indirectly, from her financial support: Ms. Fontaine worked on the union's behalf during working hours and made arrangements for an employee to travel to Longueuil during his working hours, in a company vehicle, to sign up another employee.

Section 25(1) of the Code stipulates the following:

"25.(1) Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part."

The Code therefore prohibits the Board from granting certification to an employee association that does not offer all the guarantees of independence that the Code requires of such an organization.

The Board had the following to say on this subject in CJRC Radio Capitale Ltée (1977), 21 di 416; [1977] 2 Can LRBR 578; and 78 CLLC 16,124 (CLRB no. 89):

"Similarly, section 134(1) of the Code prohibits the Board from certifying a trade union which is so dominated or influenced by an employer that its fitness 'to represent employees of the employer for the purpose of collective bargaining is impaired'. If the intent of the Code's provisions governing collective bargaining is to be respected, it is essential that the union representing the employees be well and truly their representative and not a representative of the employer or an organization which is so dominated by the employer that it could not effectively represent the employees in relations with the said employer."

(pages 432; 591; and 360)

The Board goes on in this same decision to identify a number of signs by which a dominated or influenced union can be recognized:

"Since the Code prohibits the domination of the financing of a trade union by an employer or any interference on his part, employers seldom openly encourage the creation of a trade union or contribute financial support to this end. Similarly, since a trade union that is dominated or influenced by an employer is liable to be refused certification, unions are unlikely to disclose readily any ties they may have with

employers. Only rarely do we find a party admitting to having violated the provisions of the Code or openly engaging in prohibited activities. Nonetheless, experience has shown that there are many signs which enable us to recognize a union that is dominated or influenced by an employer. Frequently, such a union will be an independent one, created when a unionization campaign is being conducted by another union. In general, this type of union is created in great haste and recruits a majority of the employees of the enterprises very quickly. This can often be explained by the more or less discreet support given the union by the employer or some of his representatives. Union meetings are held at the workplace and during the working hours of the employees, who are not penalized in any way. Recruitment is also done during working hours, often with the knowledge of the employer's representatives, if not with their assistance. The emerging union has limited financial resources but can nevertheless afford all the professional or technical assistance it needs. Documents are typed or photocopied at the workplace by persons working in close collaboration with the employer or with his authorization. Management representatives attend or participate in union meetings or openly invite employees to attend. Needless to say, circumstances vary with each case. The fact remains, however, that a union which is dominated or influenced by an employer, can seldom be set up without incidents of this nature occurring. Consequently, if there is evidence that such incidents have occurred, this must raise some doubt as to whether the union is genuinely independent of the employer. The Board must then investigate the matter to determine whether it is faced with a situation in which section 134(1) of the Code should be applied."

(pages 432-433; 591-592; and 360)

Almost all the circumstances described in the above case are present in the instant case. The Board, moreover, is satisfied that the degree of the employer's domination in this case is more than sufficient to conclude that the mis-en-cause union is incapable of adequately representing the employees. The Board had the following to say in another similar case:

"Is the domination or influence of the employer on the Association such as to impair the fitness of the Association to represent the employees in their collective bargaining? 'Are we satisfied that a sufficient arm's length relationship exists so that meaningful collective bargaining ... the kind of collective bargaining contemplated by the Code ... can be undertaken and sustained?' A conclusion was not difficult to reach. How can the Association bargain at arm's length with the employer when it owes it so many favours? It owes the employer its financing, its formation, its

ability to recruit members. In that context, there can exist no arm's length collective bargaining with the employer and we must conclude that the Association is so dominated or influenced by the employer that its fitness to represent the employees of Air West, for the purpose of collective bargaining, is impaired and, accordingly, on this second issue related to the application of Section 134(1), we would not have certified the Association and would have dismissed its application for certification and ordered that the ballots taken following the vote ordered under section 118(i) be destroyed without being counted."

(Air West Airlines Ltd. (Air West Operations Ltd.) (1980), 39 di 56; and [1980] 2 Can LRBR 197 (CLRB no. 231), pages 92; and 226-227)

Along the same lines, see Graham Cable TV/FM, supra.

There is no doubt in this case that the mis-en-cause union does not meet the independence criteria imposed by the Code. Consequently, the Board cannot grant it the status of employee association for the purposes of certification and collective bargaining.

For all these reasons, the Board issued the following conclusions on December 12, 1989:

"*ALLOWS the complaint of unfair labour practice made by the complainant;*

DECLARES that the employer contravened the provisions of the Canada Labour Code, in particular sections 94(1)(a) and 96;

ORDERS the employer to cease contravening the provisions of the Canada Labour Code, in particular sections 94(1)(a) and 96;

DECLARES null and void the memberships in the Syndicat des employés du Transport Ganeca (BSQ) Inc., for the purposes of the applications for certification made in files 555-2991 and 555-3002;

ANNULS the representation vote held on November 4, 1989 in files 555-2991 and 555-3002;

ORDERS the immediate destruction of the ballots that have remained sealed by order of the Board, without this vote being counted;

DECLARES that the application for certification (555-2991) filed by the Transport Drivers, Warehousemen and General Workers' Union, Local 106, on August 21, 1989, meets the requirements of the Code. The Board issues a certification certificate in its name;

DISMISSES the application for certification (555-3002) filed by the Syndicat des employés du Transport Ganeca (BSQ) Inc. and closes its file in this case;

ORDERS the employer to post immediately this decision and the attached certification order on the work premises in Saint-Hyacinthe and in Drummondville, for a period of 15 days;

ORDERS the employer to transmit a copy of the present decision to each employee by including a copy thereof in the pay envelope for the week of December 18, 1989."

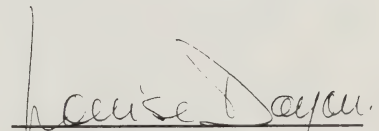
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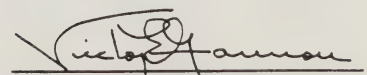
In light of the foregoing, the Board issues the following additional conclusions:

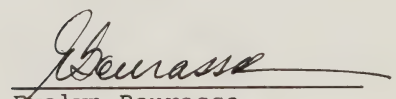
DECLARES that the employer contravened section 94(3)(a) of the Canada Labour Code;

ORDERS the employer to cease contravening section 94(3)(a) of the Canada Labour Code;

ORDERS the employer to post this decision immediately on the work premises in Saint-Hyacinthe and in Drummondville, for a period of 15 days.


Louise Doyon
Vice-Chair


Victor E. Gannon
Member of the Board


Evelyn Bourassa
Member of the Board

ISSUED at Ottawa, this 13th day of February 1990.

information

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Summary

G. RACINE ET AL., COMPLAINANTS, THE
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 375, RESPONDENT
UNION, THE MARITIME EMPLOYERS'
ASSOCIATION, MONTREAL, QUEBEC, MIS-
EN-CAUSE EMPLOYER, AND W.
PINSONNEAULT ET AL., INTERVENERS.

Board Files: 530-1719
745-3225

Decision No.: 781

This case deals with complaints of
unfair labour practice and of breach
of the duty of fair representation
(sections 37 and 95(i) of the Canada
Labour Code - Part I) as well as
with an application for review
seeking to specify the incidental
provisions of a Board order
rescinding the certification of
Local 1845 and broadening that of
Local 375 (section 18 of the Code).
The complaints and application for
review were dismissed.

The complainants, who were
previously represented by Local
1845, alleged that Local 375 whose
bargaining unit was enlarged to
include them had acted arbitrarily
during the negotiations and had not
implemented the Board order
concerning their equitable
integration into the job security
list. The terms of the integration
negotiated by Local 375 and the MEA
do not recognize the seniority of
the employees who were represented
by Local 1845, in violation of the
order issued by the Board on
September 15, 1987 (LD 611).

After having examined the evidence,
the Board concluded that the section
37 complaint was untimely. However,
the Board invited the parties to be
vigilant upon renewing their
collective agreement and called to
mind the order issued in letter
decision no. 611.

The section 95(i) complaint was
dismissed for lack of evidence.

Résumé de Décision

G. RACINE ET AUTRES, PLAIGNANTS,
ASSOCIATION INTERNATIONALE DES
DEBARDEURS, SECTION LOCALE 375,
SYNDICAT INTIME, ASSOCIATION DES
EMPLOYEURS MARITIMES, MONTREAL
(QUEBEC), EMPLOYEUR MIS EN CAUSE, ET
W. PINSONNEAULT ET AUTRES,
INTERVENANTS.

Dossiers du Conseil: 530-1719
745-3225

N° de Décision: 781

Plaintes de pratique déloyale et de
violation du devoir de
représentation juste (article 37 et
alinéa 95i) du Code canadien du
travail - Partie I). Demande de
révision visant à faire préciser les
dispositions accessoires à une
ordonnance du Conseil rescindant
l'accréditation de la section locale
1845 et élargissant celle de la
section locale 375 (article 18 du
Code). Les plaintes et la demande
de révision ont été rejetées.

Les plaignants, antérieurement
représentés par la section locale
1845, allèguent que la section
locale 375 dont l'unité a été
élargie de façon à les englober a
agi de manière arbitraire dans ses
négociations et n'a pas exécuté
l'ordonnance du Conseil relative à
leur intégration équitable à la
liste de sécurité d'emploi. Les
modalités d'intégration négociées
par la section locale 375 et l'AEM
ne reconnaissent pas l'ancienneté
des employés antérieurement
représentés par la section locale
1845, contrairement à l'ordonnance
rendue par le Conseil le
15 septembre 1987 (LD 611).

Après examen de la preuve, le
Conseil a jugé que la plainte en
vertu de l'article 37 était
prescrite parce que portée hors
délai. Le Conseil invite néanmoins
les parties à la vigilance lors du
renouvellement de leur convention
collective et rappelle l'ordonnance
rendue dans sa décision-lettre
n° 611.

La plainte en vertu de l'alinéa 95i)
est rejetée faute de preuve.



The application for review was dismissed on the ground that the complainants were not a party to the certification order and were not entitled to apply for reivew. Furthermore, as the alleged reason for review was the breach of the duty of fair representation, the Board stated that section 18 cannot be used to circumvent the specified 90-day time limit to file a complaint under section 37 of the Code.

La demande de révision est rejetée au motif que les plaignants qui n'étaient pas partie à l'ordonnance d'accréditation n'ont pas qualité pour en demander la révision. De plus, comme le motif de révision allégué est le manquement au devoir de représentation juste, le Conseil déclare que l'article 18 ne permet pas de contourner le délai de rigueur de 90 jours pour présenter une plainte en vertu de l'article 37 du Code.

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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

G. Racine et al.,
complainants,
and
International Longshoremen's
Association, Local 375,
respondent union,
and
Maritime Employers'
Association,
Montréal, Quebec,
mis-en-cause employer,
and
W. Pinsonneault et al.,
interveners.

Board Files: 530-1719
745-3225

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Linda M. Parsons and Mr. Robert Cadieux, Members.

Appearances:

Mr. Pierre-Yves Prieur, assisted by Mr. G. Racine, for the
complainants;
Mr. Luc Martineau and Ms. Lyne Robichaud, assisted by
Mr. Théodore Beaudin, President, for the union;
Ms. Manon Savard and Mr. John Coleman, assisted by
Mr. Robert Paquette, manager, for the employer; and
Mr. Gilles Casavant, for the interveners.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

The Action

This case concerns a complaint accompanied by an application
for review filed by 44 longshoremen against their union,

Local 375 of the International Longshoremen's Association (the ILA or the union). The ILA holds a multi-employer certification granted under section 34 of the Canada Labour Code (Part I - Industrial Relations) to represent almost all longshoremen employed at the port of Montréal. They work for a group of employers represented by the Maritime Employers' Association (the MEA or the employer), mis-en-cause in these proceedings. The complainants base their proceedings on sections 18, 37, 95(i) and 97(1) of the Code, which read as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

. . .

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

. . .

95. No trade union or person acting on behalf of a trade union shall

. . .

(i) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part.

. . .

97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94 or 95; or

(b) any person has failed to comply with section 96."

These proceedings led some 15 other longshoremen represented by the union to file as interveners in support of the union's position.

The Board held a hearing into this matter from January 9 to 12 and on January 17, 1990 in Montréal.

II

The Facts

Until 1987, all the complainants were represented by ILA Local 1845. Until September 1987, that Local represented the dockers employed in what were then commonly called "coastal" operations, whereas Local 375 represented those in the "ocean-going" sector. In circumstances more amply described in Maritime Employers' Association (MEA) (1987), 71 di 77 (CLRB no. 648), the Board ruled in September 1987 that there was no longer a reason to distinguish between the "coastal" and "ocean-going" sectors in Montréal and that the two bargaining units, until then separate, should be merged into one. At that time, Local 375 represented some 1000 longshoremen, while Local 1845 represented only approximately 100. The Board rescinded the certification of Local 1845 while extending that of Local 375. The latter Local then had to take on the collective representation of the longshoremen from the "coastal" sector. It is basically because the complainants believe that Local 375 has not equitably integrated them into its bargaining unit they have come before us.

Following a pre-hearing conference held with the Board, the parties' representatives reached an agreement on a number of admissions.

"1 - The applicants criticize the respondent for not putting them on the job security list according to the date on which they initially joined Local 1845.

2 - The applicants complain of the order in which the mis-en-cause invites them to choose their annual leave.

3 - The applicants complain that positions have been given to new employees without posting, and that they have not had the opportunity to apply for those positions.

4 - The applicants do not complain of the work schedule and leave assignment.

5 - The applicants do not complain of the application of the job security clauses, but they dispute their position on the job security list."

(translation)

In addition, the complainants admitted to the following facts cited by the respondent.

"3. ...

(a) After their collective agreement (Exhibit I-1) expired on December 31, 1986, the mis-en-cause and the respondent began to bargain collectively under the Code to renew it.

(b) These negotiations culminated on July 23, 1988 in the parties concluding a memorandum of agreement (Exhibit I-2), which was subsequently accepted by their members as a 'complete and final settlement of the negotiations to renew their collective agreement' (article 1 of said memorandum of agreement).

(c) On July 26, 1988, during a special assembly of the members of the respondent, held at the Paul-Sauvé Centre, said memorandum of agreement was examined by its members and adopted in a secret vote, the results of which were as follows: '492 in favour, 77 opposed and 3 null,' as appears in the minutes of said special assembly (Exhibit I-3).

(d) On August 5, 1988, following ratification of said memorandum of agreement by their members, the parties did in fact sign a new collective agreement (Exhibit I-4).

4.(a) The applicants/complainants belong to the bargaining unit and are legally bound under section 56 of the Code by the contents of this new collective agreement. The latter explicitly applies

'to all persons who, pursuant to the clauses of this collective agreement, are employed in and assigned to the performance of work under the direction of management in connection with the loading or unloading of ocean-going and coastal vessels in the port of Montréal' (article 1.04).

(b) This collective agreement is still in force and has been in force since August 7, 1988 (see article 37).

5. The collective agreement I-4 regulates and definitively establishes the seniority of the applicants/complainants:

(a) The applicants/complainants, like the other members of ILA Local 1845, have all been integrated into the job security list (Group I) according to the order of seniority recognized by the parties (see Appendix 'G' of memorandum of agreement R-2, which has become Appendix 'E' of collective agreement I-4).

(b) In effect, the parties have agreed that employees named on the 'list of employees covered by job security,' dated August 2, 1988 (Exhibit I-5) have the benefit of the job security plan (1600 hours for Group I employees in Appendix 'E') provided for in article 15 of the collective agreement.

(c) In accordance with article 19 of collective agreement I-4, the seniority rank of the applicants/complainants is that which is indicated opposite their names on the 'list of employees covered by job security' (Exhibit I-5). ..."

(translation)

The complainants have also recognized through their counsel the accuracy of the following facts cited by the union.

"6. The added employees [complainants] subsequently found themselves to be subject to the respondent's collective agreement, as amended by the parties to take account, in particular, of their addition to the bargaining unit (Exhibit I-4).

7. Before being governed by the collective agreement entered into by the respondent, former Local 1845 members were covered by a collective agreement entered into with the mis-en-cause on November 29, 1983, as is evidenced from said collective agreement (Exhibit I-7).

8. Collective agreement I-7 was the only collective agreement ever entered into with the mis-en-cause.

9. Prior to signing agreement I-7, former Local 1845 members were covered by various collective agreements entered into individually with various employers.

10. Furthermore said collective agreements were not all entered into by the same union, nor for the same group of employees.

11. Indeed, until July 5, 1982, longshoremen working for Clarke Transport, Newfoundland Steamships Ltd. and Terminus Maritime Inc. were represented by ILA Local 1932 pursuant to Board orders.

12. While Local 1845 members were referred to various employers under orders received through a hiring hall operated by that union, such was not the case for those represented by Local 1932.

13. Moreover, seniority and length of service of the employees represented respectively by Locals 1845 and 1932 were defined and calculated differently under their collective agreements, and the members did not all have the same status under those agreements.

14. In fact, while there was a seniority list for the employees of Clarke Transport and Terminus Maritime represented by Local 1932, there was none for purposes of applying the collective agreements entered into by Local 1845.

. . .

19. ... On or about July 14, 1983, in file 555-1932, Local 1845, which had in the meantime integrated into its ranks Local 1932 members, filed with the Board an application for geographic certification under section 132 of the Code (Part V).

20. Thus on April 7, 1986, like Local 375, which already held similar certification for longshoremen handling ocean-going vessels, Local 1845 was certified to represent longshoremen handling coastal vessels, with said certification being reviewed on May 26, 1986 to substitute, as employer, the name of the mis-en-cause for the employers designated in the original order.

21. On issuing that certification, the Board, proprio motu, questioned the appropriateness of a merger of the above-mentioned geographic certifications under section 119 of the Code and announced then that a notice would be sent to the interested parties inviting them to file their submissions with respect to that matter, as is evident from the decision of April 6, 1986 in file 555-1932.

22. Regarding the bargaining unit members then represented by the respondent, they were covered by a collective agreement entered into with the mis-en-cause (having formerly, from time immemorial, had a collective agreement with the Shipping Federation of Canada) and since at least 1972 renewed from year to year upon expiration.

. . .

26. Also, in 1978, while these provisions were similar, arbitrator Roland Tremblay had the following to say on this matter.

'Seniority is mentioned in article 19 of the collective agreement, and according to clause 19.01 it applies exclusively to the group of regular employees as stipulated in clause 13.01.

Clause 13.01 speaks of job security and concerns only those longshoremen who were members of Local 375 when the collective agreement was signed.

This seniority is thus linked to job security, and said job security applies only to longshoremen who were members of Local 375 and who were included on the list submitted by the Maritime Employers' Association when the agreement was signed.

It is immediately obvious that there is a close link between the notion of seniority referred to in clause 19.01, the notion of job security in clause 13.01 and the notion of membership in Local 375 at the time of the signing of the agreement.

It is also immediately obvious that it is the parties' intention to protect the members in terms of their employment, their work, their classification -- in other words, their job.

That is the very substance of this collective agreement.' (emphasis added)

. . .

30. At the time of the merger with Local 1845, unlike the collective agreement then applicable to the unit represented by Local 375, the collective agreement applicable to the members of the unit represented by Local 1845 contained no seniority clause.

31. ... In practice, for the purposes of applying the collective agreement, Local 1845 has never taken seniority or length of service into account.

. . .

35. In an award involving Local 375 and the mis-en-cause (grievance no. 847) dated January 7, 1986 (Exhibit I-9), the basic distinction between 'preference in employment' and 'job security' is clearly explained by arbitrator Claude Foisy, who has the following to say at page 9:

'This clause [clause 13.06] provides that the addition of employees to the job security list -- meaning that they are to be granted permanent status -- should result from the joint agreement of the parties. On this subject, see award dated January 6, 1986 concerning grievance no. 599.

The parties, in clause 1.07, explicitly recognized the Employer's right to resort to qualified manpower if the Union could not supply said manpower according to the agreed-upon order of priority. Clause 1.07 does not speak of permanence with respect to "hiring," a term which would be applied more appropriately to the permanence of employment contemplated in clause 13.06. Clause 1.07 instead uses the word "call." This term suggests hiring for the needs of the

moment, with no guarantee that the employee will be called in the future.' (emphasis added)

. . .

37. Thus the representative of Local 1845 had, among other things, the following to say before the Board:

'Lastly, as regards the seniority list. Once again, to be consistent with the arguments that I have developed, we agree that the years of service, as argued by Mr. Rochon -- that the years of service of the members -- of 99 members -- must be recognized and entered on Local 375's seniority list. On the other hand, this having been said, the seniority list in Local 375's agreement does not apply unless there is job security. Thus to say that one recognizes, to take the example of Mr. Bombled, that he has been at the port of Montréal since 1964 is to say that he has been there since 1964, and that does not necessarily have consequences for job security, unless -- and this is the very important point that I want to make to the Board -- unless we know how job security or additions to the job security system are going to be decided. And there we are in effect entering the realm of negotiation. But we agree, of course, that all the years of service of the 98 members should be recognized, that these years should be entered on a single seniority list. We agree with Mr. Rochon's argument to the effect that following your decision, there can be only one seniority list. But let it be very clear to the Board and to Local 375, and especially to Local 375 members, that the objective pursued by the union that I represent is in no way to remove anyone from the job security system. It is not a matter of taking away rights from the 760 who have job security. It is not "us against them." It's not a matter of the oldest bumping the newest among the 760. That is not at all our intention. Rather, we are asking to be recognized with all our rights as belonging to a regular work-force. And we therefore believe that our years of seniority must be fully recognized, and taking account of our years of seniority but more especially the fact that we are regular employees, if there is an additional need for regular employees, if only from the addition of the work that Local 1845 members were performing before, then it should be the regular members who get into a system of job security. Thus, as regards, I repeat, seniority, we want full recognition, but as regular employees -- taking account of our seniority, but especially as regular employees. If there is regular work that becomes available under the aegis of the 375 agreement, it should go to regular employees before it goes to extra employees. And we consider to be extra employees the 250 associate members -- or members, depending on whom one listens to -- also to be compared with our 30 associate members.' (emphasis added)

(Excerpt from transcript of hearing of September 1, 1987, comments of Mr. Allen Gottheil, at pages 44 to 46)

. . .

40. The Board thus noted in decision rendered on August 5, 1987:

'The opposition of the shipping companies operating ocean-going vessels to the merger of the two groups is based essentially on a fear of an increase in labour costs. They are afraid that this increase will lead to an increase in the assessment or so-called "tax" that the shipping companies pay the MEA for each ton, or the equivalent, handled. They argue that since the longshoremen in the unit that handles ocean-going vessels, or at least part of them, enjoy job security, they fear that a unit that included longshoremen handling coastal vessels would result in an extension of this job security to more employees.'

The tonnage handled, converted for the purposes of the MEA's tax, is 2,102,136 tons for ocean-going traffic. The figure for coastal shipping is 262,462 tons, or one-tenth of the volume of ocean-going traffic. Work in coastal shipping is limited to so-called conventional or container freight. These types of cargoes account for more than 95% of the tonnage of ocean-going vessels.

. . .

The principal difference between the collective agreements is in the area of job security. Therein lies the problem. While longshoremen handling ocean-going vessels work more than a million hours, those handling coastal traffic work only one-tenth of these hours. However, the former group enjoys job security, which represents 133,623 hours a year.' (emphasis added)

Decision no. 648, pages 13 and 14)

. . .

42. In this context, one can all the more clearly understand the submissions made before the Board on September 1, 1987 by counsel for the mis-en-cause in response to certain comments by the representative of Local 1845.

'Job security -- it's going to require all the -- it in fact requires all the persons who are added to the job security list to be versatile, medically capable of performing all existing types of occupations, and that has always been the rule followed. ... But all those people meet the basic medical criteria, the basic criteria in terms of dexterity and versatility possible for being able to do work either as longshoremen on the slipways or as heavy equipment operators. And that's essential. And it's not because there must be a need, or there would allegedly be a need, for two heavy equipment operators that the two heavy operators -- the most senior, for example -- would be those who would go onto job security. That's not true. ... So with regard to Local 1845, employees will of course be recognized as having qualifications in terms of operating certain pieces of equipment or others, because they operated them in the past. That does not, however, mean -- and this is what I was saying in the application that we filed -- that those persons should go onto job security immediately

because they are qualified to do a job. That's not true, that's not how it works, it's never worked like that, and that's not what we're aiming for. So, all this to say, yes, they are employees. Yes, they are employees of whom we recognize the existing status, as employees, on the same basis as for the 1010 others or however many, on the same basis as for the 750 plus a certain number of other associate members who over the years -- you have the lists -- there, who are there. They are also employees. There are some who are regular employees in the sense that they come regularly. Others are casual employees in the sense that they come less regularly. But that's all. Within the meaning of the collective agreement, the work, when we are speaking of Local 375, when we are speaking of regular employees, we are speaking -- and this is where it's necessary to be very careful -- we are speaking of employees covered by job security and nothing else. These are not employees -- any other employee is not as such, under the terms of the collective agreement, a regular employee.' (emphasis added)

(Transcript of hearing of September 1, 1987, comments of Mr. Gérard Rochon, pages 69 to 71)

43. Following the Board's decision of September 15, 1987, the parties continued to bargain in good faith in order to enter into a collective agreement and find, with regard to Local 375, an equitable way of integrating former Local 1845 members into the bargaining unit. A settlement between the parties was reached on July 23, 1988 (memorandum of agreement - Exhibit I-2).

(a) During those negotiations, a representative of former Local 1845 members was present as an observer.

. . .

45. In his 53-page report of November 25, 1987, conciliation commissioner Marc Gravel had the following to say in particular regarding job security:

'Job security is the main issue in the negotiations.'

The ILA is calling for a floor of 930 longshoremen on security, as well as any replacement on a one-for-one basis. Any increase in the current number of longshoremen on security must first go by way of the recently integrated "coastal" longshoremen, and then go to the new members of ILA Local 375, all in accordance with the fairly strict terms (13.06) set out in the union demands.

'The MEA objects to the job floor, considering the fluctuations inherent in the system, the enormous costs generated and the fact the addition of 96 (more or less) "coastal" longshoremen, who have never been on job security, does not cause a very significant increase in view of the total annual number of hours of longshoring and the seasonal nature of these operations.' (emphasis added)

The whole as it appears at pages 15 and 16 of said report (exhibit I-10).

46. Further on in the same report, the following recommendations, among others, were made with respect to job security:

'To the list to be provided by the MEA under clause 13.01 of the collective agreement shall be added a maximum of 110 employees, who shall henceforth have the benefit of the job security provided for in article 15.15 of the agreement. The employees who are added to said list shall be chosen in accordance with the directives of CLRB order dated September 15, 1987, the above recommendation of the conciliation commissioner and, if applicable, the provisions of Bill C-62.

Furthermore, the only ones to be added to this list shall be those who have successfully passed the screening or the entire selection process already provided for in the agreement of March 5, 1986 (Exhibit M of P-1), including training.

The philosophy and principles of this agreement shall be incorporated in the collective agreement, but this updating only serves to make it conform to the present recommendation. In future, these principles shall apply each time it is necessary to use existing clause 13.06.' (page 25; emphasis added)

. . .

48. The parties also agreed that the continuous service of former Local 1845 members for purposes of calculating vacation pay (article 23) was that which was indicated on the 'union seniority list.' The sole basis for that list was the date of entry into Local 1845.

49. Following the integration of 'coastal' operations, new classifications appeared for Local 375 members, and former Local 1845 members were assigned these new classifications without any posting, in de facto recognition of their qualifications.

. . .

55. Thus, while formally asked to do so by the respondent in its request for details, the applicants have still not provided certain information -- specifically, information on their 'length of service' and the seniority rank they claim."

(translation, except for excerpt from CLRB decision no. 648)

The applicants also called five witnesses, namely four longshoremen and Robert Paquette, labour relations officer with the MEA, where he is described as a contract manager.

The oral evidence dealt mainly with one of the complainants' claims, namely the impact of their seniority ranking on choosing annual leave. The evidence also dealt with the way in which the complainants had come to realize that the collective agreement between the union and the MEA, entered into in July 1988, was prejudicial to them.

When Local 375 entered into its last collective agreement, it succeeded in having the number of longshoremen with job security raised from some 760, at which it was set under the old collective agreement, to 839. The term "job security" refers to a guaranteed minimum annual income.

The complainants were added to the job security list immediately after the 760 employees already covered and were assigned numbers following directly on those of the 760 already registered. Apparently, one's position on that list constitutes seniority for the purposes of the collective agreement. The list in question was prepared by the union and accepted by the employer during negotiations.

The order in which former Local 1845 members were classified in relation to each other on the seniority list was determined on the basis of the seniority list drawn up by Local 1845 when it was still certified. In other words, the longshoreman who was the most senior longshoreman in Local 1845 retained, in relation to his fellow workers in the "coastal" sector, the rank he had held before. However, if the same longshoreman had worked at the port for longer than former Local 375 members, he was not integrated into the job security list at a higher rank than any Local 375 member granted job security prior to him.

Jacques Bombled, ex-president of Local 1845, was ranked 800 when he went onto the job security list. Opposite his name, the job security list indicates the "date of entry" as July 3, 1987, the date the union admitted him to its ranks; the same was true for all the longshoremen formerly represented by Local 1845. As a matter of fact, Mr. Bombled has worked at the port since 1964.

The list of employees represented by Local 375 since before 1987 indicates, as each person's date of entry, not the date the employee was admitted to Local 375, but rather the date he began to work at the port of Montréal as a professional longshoreman. Among said dates of entry of such employees are a number as recent as 1979, 1980, 1981, 1983, dozens in 1964 and 1965, still others going back to the 1950s and even one -- the earliest -- going back to August 1943.

Regarding employees whose names come after those of Local 1845 members, they appear on a seniority list without any indication of either the date they began working at the port or the date they joined the union. This document, in the form described above, constituted Appendix G of the memorandum of agreement that the MEA and the union concluded in July 1988. It was incorporated into the collective agreement by reference in the text of the agreement. That reference was to Appendix E, which was said to show "each employee's seniority rank opposite his name" (translation). But in fact, Appendix E of the collective agreement, which exists in the form of a brochure distributed to the members, does not contain any such list or state any names.

The president of Local 375, called as a witness for the respondent, explained that the integration of various locals -- 1926, 1927, 1928, 1932, etc. -- into his own unit had been a painful process taking place over several years,

often as a consequence of a commission of inquiry or government intervention. He explained that basically, when integrating employees into the job security list prior to 1987, the Local took various data into account, including the number of hours each had worked per year since coming to the port. Thus an employee who had begun working at the port in the 1950s but who had not worked a sufficient number of hours there was recognized as having seniority only for years in which he had worked at the port at least 550 hours. An employee could thus find himself ranked lower than another who had arrived after him if that employee had worked on a more regular basis.

Mr. Beaudin recognized that when the list was drawn up integrating coastal operations employees, the MEA had provided the union with certain data which, on examination, were found to go back to 1977. However, the ILA disregarded such data as unusable and instead chose to integrate all Local 1845 employees on the same date -- July 1987 -- regardless of their length of service. Mr. Beaudin added that the collective agreement made no reference to seniority and that the latter piece of information was useless. It was neither to the advantage nor to the disadvantage of an employee.

For their part, the complainants argue that since the collective agreement was submitted to the members in the summer of 1988 and subsequently signed, one of their own, named to act as an observer on the bargaining committee, had always supported -- wrongfully, in their view -- Mr. Beaudin's position that seniority is meaningless. It was only in November 1988, when choosing their annual leave, that the complainants realized how their seniority rank affected their working conditions.

Article 23 of the current collective agreement deals with annual leave. It is useful to reproduce certain excerpts:

" 23.01

Any employee with more than thirty (30) continuous days, two hundred and fifty (250) hours and up to fourteen (14) years of continuous service to his credit shall be entitled to vacation pay equivalent to 7% of his annual remuneration.

23.02

Any employee with fifteen (15) to nineteen (19) years (inclusive) of continuous service to his credit shall be entitled to vacation pay equivalent to 8% of his annual remuneration.

23.03

Any employee with twenty (20) to twenty-four (24) years (inclusive) of continuous service to his credit shall be entitled to vacation pay equivalent to 9% of his annual remuneration.

23.04

Any employee with twenty-five (25) years or more of continuous service to his credit shall be entitled to vacation pay equivalent to 10% of his annual remuneration.

. . .

23.07

(a) All employees covered by the job security plan described in article 15 shall be invited between September 1 and October 15 of each year to determine their annual leave for the following year, that is, from January to December.

(b) Management may require that annual leave be taken in accordance with the volume of work in the port, and it shall determine the number of employees to go on leave in a given period, except in the case of the priority periods provided in clause 23.08(a) and (b).

(c) Annual leave shall be assigned according to seniority and the requirements for employees in each classification, with priority in selecting dates being given to the most senior employees.

(translation; emphasis added)

Jacques Bombled, like his colleagues, showed up in early November to choose his annual leave. When he arrived at the employer's office, he was informed that because of his rank (no. 800) on the seniority list, he could not choose

his annual leave, and in fact, the employer assigned it to him.

Two factors influence an employee's choice of annual leave. Briefly, the first is his classification and the second, his seniority. Thus, among those employees with the same classification, the most senior has first choice from the menu of dates established in accordance with the requirements of the port.

Another witness testified that from September to November, the complainants were unable to obtain from either the employer or the union the seniority list referred to in the collective agreement. He added, without subsequently being contradicted, that despite repeated efforts to obtain the list from the union, their request was always turned down, often in an acrimonious and insulting manner.

Clearly, another aspect of the annual leave clause relates to the employee's pay. On this subject, the collective agreement contains an appendix drafted specifically with regard to former Local 1845 employees. It consists of memorandum of agreement no. 4:

"MEMORANDUM OF AGREEMENT #4

. . .

It is agreed that solely for purposes of calculating the vacation pay provided for in clauses 23.01, 23.02, 23.03 and 23.04, the length of continuous service of former Local 1845 members is that which is indicated on the attached list.

. . .

SENIORITY LIST - ILA LOCAL 1845

(dated August 25, 1987)

(translation; emphasis added)

As explained above, this list from former Local 1845 establishes only the seniority of the longshoremen from the "coastal" sector in relation to each other. It determines only the seniority of employees from the unit previously represented by Local 1845. That seniority extends back to various years, from 1946 to the 1970s. Thus, according to that list, Mr. Bomble's seniority goes back to 1968 and not to 1988 as on the job security list. As to his annual leave, governed by clause 23.03 of the agreement and by memorandum of agreement no. 4, he is accordingly recognized as having 20 years of continuous service for remuneration purposes; but for purposes of choosing the dates for his annual leave, the same agreement recognizes him as having only a single year of seniority. Like the other complainants, he became aware of this fact at the beginning of November 1988.

On November 14, 1988, a lawyer consulted by the complainants formally notified both the MEA and Local 375 that they had acted in a discriminatory manner. He wrote:

"A group of former members of ILA Local 1845 who are now members of Local 375 contacted me. They complain that unlawfully and without having the right to do so, you refused to recognize their seniority rights as employees of the MEA and as members of Local 375."

(translation)

The complainants subsequently chose to consult another lawyer and then a third, who on March 28, 1989 filed the complaint and application for review now before us.

The collective agreement contains, unusually so, an appendix in which the union indemnifies the employer for any damages it might suffer as a result of an action that a longshoreman might bring "in connection with his rank on the seniority list":

"July 23, 1988

Maritime Employers' Association
Edifice du Port de Montréal
Aile #2, Cité du Havre
Montréal, Quebec
H3C 3R5

Attention: Mr. Arnold E. Masters, President

Dear Sir:

Article 11(d)(ii) of the memorandum of agreement signed on July 23, 1988 between the International Longshoremen's Association, Local 375 (the union) and the Maritime Employers' Association (the employer) states that the union agrees to come to the defence of the employer and compensate it for any action that may arise in connection with the employer's acceptance of the seniority list which we have this day provided to you. This list is included in the memorandum of agreement as Appendix G.

The union thus confirms that it will come to the defence of the employer and compensate it for any monetary award in principal, interest and costs that might be made against the employer if a member of the union as of the date hereof (a member) should bring any action against the employer in connection with his rank on the seniority list.

The employer agrees to offer its full co-operation at all stages of the legal process, thereby recognizing that the union is to remain in charge of all pleas and proceedings.

Yours very truly,

(sgd.)

Théodore Beaudin
President"

(translation)

A number of Board decisions have dealt with changes to certification in the port of Montréal. Among them was a letter decision rendered in file 555-1932, Association des employeurs maritimes et autres, April 7, 1986 (LD 528), in which the Board certified Local 1845 pursuant to section 34 of the Code. While it allowed the application, the Board made an order under section 18 requiring that the certification held by Local 375 be reviewed. According to the Board, there was perhaps no need to have two multi-employer certifications in the same port. It therefore

invited the interested parties to appear and make representations on the issue.

It settled the matter in Maritime Employers' Association (MEA) (648), supra, rescinding the certification of Local 1845 and enlarging that of Local 375 to include the longshoremen who until then had belonged to the unit covering coastal operations. On the subject of integrating the employees newly incorporated into the bargaining unit represented by Local 375, the Board had the following to say:

"The employees who until now have belonged to either the unit covering ocean-going operations or the unit covering coastal operations will henceforth form only one unit. The bargaining agent must bear in mind its obligations under section 136.1 [now 37] of the Code:

'136.1 A trade union or representatives of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.'

(emphasis added)

. . .

Inevitably, enlarging the unit represented by Local 375 requires the integration into this unit of the employees who until now have worked in the so-called coastal sector, having regard to such considerations as seniority, dispatching priorities, etc."

(page 100)

The Board, to enable the parties to implement its decision as smoothly as possible, somewhat delayed its coming into force. In subsequent letter decision in file 530-1376, Association des employeurs maritimes, September 15, 1987 (LD 611), the Board set the amended certification for September 1, 1987. It then issued an order including the following provisions:

"... Concerning the questions raised by the parties regarding recognition of the seniority and status of the employees formerly represented by Local 1845, the Board finds that this is a matter for the bargaining agent and the employer to resolve at the bargaining table. The Board would specify, however, that the terms of integration to be negotiated by the parties must ensure that the prior length of service of each employee previously represented by Local 1845 is fairly recognized within the bargaining unit. The Board accordingly orders Local 375 and the employer to review, in good faith and in a manner that is neither arbitrary nor discriminatory, the current seniority lists so as to recognize the length of service of each employee included in the bargaining unit now represented by Local 375."

(page 17; translation; emphasis added)

That was in September 1987. When in November 1988 the complainants noted what they considered to be an injustice with respect to the seniority attributed to them by their new bargaining agent, they sought legal counsel. However, they neither availed themselves of the grievance procedure nor asked their union representatives to do so on their behalf.

That is the evidence.

IV

Arguments

The complainants

Basically the complainants rely on sections 37 and 18 of the Code. No argument is offered to support their allegation based on section 95(i) of the Code.

Citing Association des employeurs maritimes (LD 611), supra, as well as Maritime Employers' Association (MEA) (648), supra, the complainants conclude that these decisions were not observed. They therefore ask the Board to review the

September 1, 1987 order "to clearly establish the rights of former Local 1845 members and enjoin Local 375 and its representatives to recognize and apply such rights" (Exhibit 1, page 4, translation).

The complainants also draw our attention to the effects of the seniority list on the choice of annual leave as well as on the dispatching procedure (clause 8.01(f)); they also refer us to clause 19.03 of the agreement, dealing with the on-the-job training procedure.

In their view, they have shown that on the one hand Local 375 acted arbitrarily in its negotiations and that on the other it did not implement the part of the Board's order concerning the fair integration of employees from the so-called coastal sector. Essentially on the basis of these allegations, they conclude that section 37 was violated and the September 1987 order should be reviewed.

The union

Counsel for the union first argues that the complaint is untimely pursuant to section 97(2):

"97.(2) Subject to subsections (3) and (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstance giving rise to the complaint."

(emphasis added)

Counsel insists that the collective agreement was signed in July 1988 and that the complainants knew this. He adds that at best, they became aware of the situation in November 1988, that is, when through their lawyer they gave notice to both the employer and the union regarding what they alleged to be the irregularity of the seniority list.

According to counsel, the complainants knew or should have known by November 1988 that they had 90 days in which to make a complaint. He relies on Claude Latrémouille (1983), 53 di 178 (CLRB no. 433), and Donald McIntyre (1987), 72 di 127; 19 CLRB (NS) 196; and 88 CLLC 16,002 (CLRB no. 665). He adds that the Board has no jurisdiction to extend the time limit set out in section 97 and cites the judgment of the Supreme Court in Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902. He also relies on Martin Poiré et al. (1987), 72 di 135 (CLRB no. 666).

So much for the matter of time limits. As to its position on the merits with respect to section 37 of the Code, the union argues that it acted in good faith. In the past, it says, when integrating into its certified bargaining unit longshoremen belonging to other bargaining units that had been merged with its own, it always took their length of service into account when reliable evidence existed. It admits that it did not do so in the case of the complainants, but only because no reliable data existed as to their actual length of service.

With respect to the application for review pursuant to section 18, counsel for the union contends that the complainants' application was vague. He adds that if the Board were to rule on the manner in which the union negotiated the employees' integration into the seniority list, it would need to have the power to make declaratory judgments, while it is only an administrative tribunal. Counsel points out that the complainants' application for review basically concerns the reasons set out in support of an order and not the order itself. Counsel argues that the Board could not interpret its own reasons without at the same time having to review the order that followed, which the complainants have not asked it to do. Lastly, counsel

contends that seniority is a matter of negotiation and that the Board should not interfere in such matters.

The MEA

For their part, counsel for the MEA refrained from making any submissions, merely answering a question from the Board regarding the above-mentioned memorandum of agreement, in which the union indemnified the employer against any damage arising from the establishment of the seniority list. Counsel stated that in their opinion said document was valid only for its signatories.

The interveners

For their part, the interveners made no submissions; they in effect supported the position put forward by the union.

V

Decision

When this matter was heard, the Board understood that it was pointless to force the parties to provide evidence for each of the 44 complainants. We instead invited them to proceed on an individual case, pursuant to section 20(1) of the Code.

"20.(1) Where, in order to dispose finally of an application or complaint, it is necessary for the Board to determine two or more issues arising therefrom, the Board may, if it is satisfied that it can do so without prejudice to the rights of any party to the proceeding, issue a decision resolving only one or some of those issues and reserve its jurisdiction to dispose of the remaining issues."

We therefore heard the case of Jacques Bombled without hearing those of the other complainants to shorten the evidence, expecting thereby to be able to issue a decision that would settle all the cases.

A - Section 37 Complaint

This provision (cited at page 2) imposes on the union the duty to act in good faith toward employees it represents. In practice, the complainants are asking for a finding that the union did not fulfil the obligation that arose from the enlargement of its certification in 1987. In particular, they argue that it did not implement the Board's order requiring that the longshoremen from coastal operations be integrated into their new bargaining unit in an equitable manner and that their length of service be fairly recognized. The evidence in fact shows that in the past, Local 375 had integrated its new members into a job security list taking their length of service into account. It did not do so for the complainants, whom it integrated in the summer of 1988. The reason given is the lack of reliable data. On the other hand, the employer, which agreed to sign the integration list drawn up by the union, nevertheless found it advisable to obtain from the union a commitment to indemnify it from any damages arising from the way in which the list had been drawn up. Must we repeat what the MEA stated in the Board's presence in Association des employeurs maritimes (LD 611), supra:

"On the subject of seniority, the MEA maintains that the seniority or length of service in question is measurable and has been measured; in short, it is a fact."

(page 12; translation)

Along similar lines, the Board had the following to say in that decision:

"All employees who will be represented by Local 375 are entitled to recognition of their length of service, without discrimination, whatever the date on which they became Local 375 members. Length of service has to do with employment and not with union membership."

(page 12; translation)

In the present case, the MEA occupied an observer position, which appears to be explained by the content of the letter of non-liability cited above (page 18). It will be recalled that it provided for the union to choose the weapons in any legal proceedings arising from that matter.

However, the question raised by the complainants regarding their seniority is a substantive one. To settle it, the Board must dispose of the argument of untimeliness based on section 97(2) of the Code (cited at page 21).

As counsel for the union pointed out, if the complainants have a course of action against the union, it is because of the content of their collective agreement or, at the very least, its application. That agreement was signed in July 1988. The complainants learned no later than November 1988 that the seniority list had been drawn up as described above. At the same time they became aware of the consequences this might have for them, especially with regard to their choice of annual leave. They first chose to consult a lawyer in mid-November. For reasons they have not explained to us, proceedings were not instituted until the end of March 1989, more than 90 days after the date on which they became aware of the problems arising from the seniority list. In this regard, the course of action is prescribed, and the Board has no jurisdiction to hear their complaint under section 37. It must dismiss it (see Upper Lakes Shipping Ltd. v. Mike Sheehan et al., supra).

This having being said, the argument raised by their union likely points them in the direction of a later course of action, for the collective agreement of which they complain is not eternal. In fact it has already expired. Without prejudging the matter, if the same provisions or other provisions to the same effect were to be incorporated in the next agreement, there is no saying that the complainants would not have new courses of action. Without deciding on the merits of a complaint made within the time limits following renewal of the collective agreement, it would appear reasonable in the circumstances to invite the complainants to be vigilant when their collective agreement is renewed, and both the union and the employer to be more careful.

The Board reminds the parties of what it said in Association des employeurs maritimes (LD 611), supra, regarding the seniority list that Local 375 and the employer had to negotiate:

"... Should the seniority list not accurately reflect a longshoreman's length of service, he will avail himself of the grievance procedure against his employer; if his union refuses to represent him or treats him in a discriminatory manner, he will avail himself of provisions of the Code against his union."

(page 12; translation; emphasis added)

This continues to be the case. The current Local 375 collective agreement contains no definition of seniority. If an employee feels that his position on the list does not accurately reflect his length of service, we do not on the face of it see what would prevent him from filing a grievance. He must, of course, be able to establish his length of service. We also fail to see how an employer who required a non-liability clause on this subject in the collective agreement could refuse to examine a grievance based on an employee's actual length of service,

particularly where that employer has recognized that the length of service was measurable and had in fact been measured. Moreover, if the union, which alone is entitled to file a grievance formally, refused to do so, the employee could then, if the union's refusal was arbitrary and in bad faith, seek a remedy against the union under section 37, so that subsequently an arbitrator could rule on his seniority. Furthermore, in the union's case, we fail to see how it could refuse to act after its president came forward and stated under oath that seniority rank does not have very serious consequences.

This having been said, in the context of this complaint, the Board cannot act owing to the effect of section 97(2) of the Code and dismisses the complaint on grounds of untimeliness.

B - Application for Review (Section 18)

Section 18 of the Code reads as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

The order the complainants seek to have reviewed is in fact a certification order, although it was accompanied by subordinate provisions intended to ensure that it was fully implemented. Individual employees are never party to a certification order as such, nor were they party to the order they seek to have reviewed. Although it is not necessary to rule on the matter, we do not believe in the present case that the complainants are entitled to apply for review of this order in the manner in which they have done so.

More importantly, the reason given to support their application for review is an alleged breach by the union of its duty of representation, under section 37 of the Code. We do not believe that review is the proper course of action to deal with such a breach, at least in the present case, since the complaint was untimely. Section 18 does not allow for circumventing another provision such as section 97(2) of the Code. (On this subject, see Grain Workers Union, Local 333 v. British Columbia Terminal Elevator Operators' Association and Prince Rupert Grain Ltd., no. A-931-88, June 20, 1989 (F.C.).)

At the hearing, the president of Local 375 maintained that his organization was planning to apply again to the Board for review of its certification order so as to extend it to currently excluded groups. Without anticipating how such an application may be dealt with by the Board, it is not unlikely that one of the factors that will be considered in such a proceeding is the manner in which Local 375 has integrated, and would in future integrate, longshoremen previously excluded from its unit.

Therefore the application for review under section 18 is dismissed.

C - Section 95(i) Application

Section 95(i) reads as follows:

"95. No trade union or person acting on behalf of a trade union shall

. . .

(i) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part."

The complainants have provided no evidence indicating that this provision applies in the present case. Their application is therefore dismissed.

For all these reasons, Jacques Bombled's case is dismissed.

In view of the interim nature of this decision, unless the complainants other than Jacques Bombled file with the Board by March 3, 1990 written representations showing why this decision does not apply to them, it shall apply to all of them as of that date.

Serge Brault.

Serge Brault
Vice-Chairman

Linda M. Parsons.

Linda M. Parsons
Member of the Board

Robert Cadieux.

Robert Cadieux
Member of the Board

DATED at Ottawa, this 20th day of February 1990.

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Summary

TEAMSTERS LOCAL UNION 938,
COMPLAINANT UNION, AND UNITED
PARCEL SERVICE CANADA LTD.,
RESPONDENT EMPLOYER.

Résumé de Décision

LA SECTION LOCALE 938 DU SYNDICAT
DES TEAMSTERS, SYNDICAT PLAIGNANT,
ET UNITED PARCEL SERVICE CANADA
LTD., EMPLOYEUR INTIME.

Board File: 745-3252

Dossier du Conseil: 745-3252

Decision No.: 782

No de Décision: 782

In this case, counsel for the employer warned counsel for the union at an arbitration hearing that if a potential witness revealed in testimony that he had earlier lied to the employer in order to retain his employment, he would now be fired. The union saw this as a breach of section 96 and various parts of section 94 of the Canada Labour Code (Part I - Industrial Relations) which prohibit interference in the affairs of a trade union and intimidation or threats against persons who testify or propose to testify in proceedings under Part I.

Dans l'affaire qui nous occupe, l'avocat de l'employeur a averti l'avocat du syndicat à une audience d'arbitrage que si un témoin éventuel révélait qu'il avait déjà menti à l'employeur pour conserver son emploi, il serait congédié. D'après le syndicat, il s'agit d'une violation de l'article 96 et de diverses dispositions de l'article 94 du Code canadien du travail (Partie I - Relations du travail) qui interdisent l'ingérence dans les affaires du syndicat ainsi que l'intimidation et les menaces à l'égard de personnes qui ont participé, à titre de témoin, à une procédure prévue par la Partie I du Code, ou peuvent le faire.

Based on the facts of the case and its view of the meaning of those facts, the Board was unable to interpret the employer's actions as constituting violations of the Code. The complaint was dismissed.

D'après les faits de la présente affaire et l'interprétation de ces faits, le Conseil n'était pas en mesure de juger que les gestes posés par l'employeur constituaient des violations du Code. La plainte est rejetée.

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Reasons for decision

Teamsters Local Union 938,
complainant union,
and

United Parcel Service
Canada Ltd.,

respondent employer.

Board File: 745-3252

The Board consisted of Vice-Chairman Thomas M. Eberlee and Board Members Evelyn Bourassa and Jacques Alary.

The reasons for decision were written by Vice-Chairman Eberlee.

Appearances:

Frank J. Luce, for the complainant, Teamsters Local Union 938; and

W.J. McNaughton, for the employer, United Parcel Service.

I

The issue in this case was whether the employer, United Parcel Service (U.P.S.), had violated provisions of the Canada Labour Code (Part I - Industrial Relations), as alleged by the union, Teamsters Local Union 938, as a result of discussions between the U.P.S. counsel and the Teamsters counsel concerning potential testimony by a Teamsters witness at an arbitration hearing.

The provisions of the Code allegedly violated by the employer were sections 94(1)(a), 94(3)(a); 94(3)(b); 94(3)(e); 94(3)(f) and 96, which read as follows:

"94.(1)(a) No employer or person acting on behalf of an employer shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

94.(3)(a) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

94.(3)(b) No employer or person acting on behalf of an employer shall impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

94.(3)(e) No employer or person acting on behalf of an employer shall seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

94.(3)(f) No employer or person acting on behalf of an employer shall suspend, discharge or impose any financial or other penalty on a person employed by him, or take any other disciplinary action against such a person, by reason of that person having refused to perform an act that is prohibited by this Part;

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

A hearing was held in Toronto on January 30, 1990.

II

The basic facts do not seem to be in dispute. However, because the employer called only one witness, who had no direct knowledge of what had passed between the two counsel, and because the complainant union called no witnesses, the Board has relied to a considerable extent on unchallenged written submissions contained in the file in order to piece together the fact picture.

It appears that a driver for United Parcel Service based in North Bay, Ontario, Rick Britton, was discharged from his employment in July, 1988. The employer alleged that he had not immediately turned in his C.O.D. collections, but had kept such monies for one or more days and had used them for his own purposes prior to turning them in. This is known as "rolling" C.O.D. funds and is a practice forbidden by the company, the punishment for which, according to the company, is always dismissal.

The firing of this employee resulted in a grievance being filed alleging that the dismissal was unjust. It was referred by the Teamsters to a board of arbitration which held a hearing on April 3, 1989.

During the course of that hearing, Teamsters counsel Eric del Junco indicated that he intended to call as a witness another driver, Robert Hawkins. According to the union's written complaint, "Del Junco put the company on notice

that Hawkins would testify about an incident which occurred in or about July 1987 (the Teamsters later changed this to 1988) of a nature similar to the incident" which caused the discharge of the union's grievor Rick Britton.

The employer's written reply to the complaint described this incident as follows:

"At the hearing on April 3, 1989 during the course of cross-examination of a company witness on the universality of the Company's response of terminating employees 'rolling' C.O.D. monies, Mr. del Junco indicated that another employee in North Bay, Robert Hawkins, had also been interviewed by the investigator. Mr. del Junco stated that Mr. Hawkins had been 'rolling' C.O.D. money like Mr. Britton but after a long talk with the investigator, Mr. Hawkins was still employed by U.P.S. Mr. del Junco stated that the union would be calling Mr. Hawkins as a witness."

The incident at the arbitration hearing was the subject of testimony by the only witness called at the Board's hearing on January 30, 1990. Stuart Virgin, now division manager for U.P.S. in West New York - then labour manager in Toronto - told the Board that M. Pope, a company official, was being cross-examined at the arbitration hearing by Teamsters counsel del Junco. Counsel was asking him questions about U.P.S.'s assertion that it always fires people who are found to have "rolled" C.O.D. funds. Mr. Virgin heard Mr. del Junco mention Mr. Hawkins' name. The witness stated that he would be surprised to find Mr. Hawkins still employed if he had been rolling funds.

Mr. Virgin said he did not know Mr. Hawkins and had never previously heard his name mentioned. After Mr. Pope had finished testifying, Mr. Virgin asked him about Mr. Hawkins.

Mr. Pope told him there had been evidence Mr. Hawkins was rolling money. A decision was therefore made to discharge

Mr. Hawkins. However, Mr. Pope said he investigated further and also discussed the situation with Mr. Hawkins. Mr. Pope told Mr. Virgin that he had discovered Mr. Hawkins had actually been instructed by his supervisor to keep C.O.D. money over night and turn it in the next day when he arrived back at the terminal late and had not completed his paper work in time for the money to catch the regular nightly run to Toronto. Mr. Virgin said Mr. Pope told him that he (Pope) concluded this did not constitute "rolling" money. The discharge of Mr. Hawkins was then rescinded.

Mr. Virgin told the Board that after hearing this, he was concerned that Mr. Hawkins, as a witness at the arbitration hearing, might contradict what he had told Mr. Pope - which was partly responsible for the decision not to dismiss him - and tell a different story about his handling of the money. It would then come out that Mr. Hawkins had in fact been guilty of dishonesty regarding C.O.D. money.

Mr. Virgin told the Board he advised U.P.S. counsel, W.J. McNaughton, to speak to Teamsters counsel del Junco about this. He did not recall that he told Mr. McNaughton specifically what to say to Mr. del Junco.

We know what passed between Messrs. McNaughton and del Junco only from the written complaint of the union and the written reply of the respondent. The union said:

"On April 11, 1989, McNaughton approached del Junco during a break in the proceedings and advised that the company would discharge Hawkins if his evidence were to differ from what he had told a company investigator about the said July 1987 (later changed to 1988) incident. McNaughton indicated that if Hawkins' evidence at the arbitration were to be true and contradictory to the version given to the company in July 1987 (should read 1988), the company would discharge him for dishonesty."

The respondent employer's reply, of which Mr. McNaughton

appears to have been the author, and the following portions of which were not disputed by the Teamsters, describes the employer's perception of the conversation as follows:

"On April 11, 1989, Mr. McNaughton advised Mr. del Junco during a break in the proceedings of what the Company understood the situation to have been with regard to Mr. Hawkins and the rescinding of his termination. Mr. McNaughton stated that in view of the fact Mr. Hawkins had provided an explanation that was satisfactory to the Company in order to retain his job and have the termination in July of 1988 reversed, the Company would terminate Mr. Hawkins' employment for breach of the Company's honesty policy if Mr. Hawkins were to now testify in a manner inconsistent with the statements he gave to the investigator in order to retain his job."

What happened next is not particularly relevant to the question of whether or not there were violations of the sections of the Code which we have cited earlier. However, we report them herewith briefly, because they round out the picture and in some respects help us to confirm or not to confirm as the case may be, certain inferences which spring from the sparse evidence so far recited.

The company did not convey the message outlined above directly to Mr. Hawkins. Mr. del Junco chose to do that; thus it was the Teamsters counsel who passed on the company's "threat" to Mr. Hawkins. (We hasten to say, however, that we do not consider that technicality to be in any way determinative in our reasoning leading up to our disposition of the complaint.) According to the union's complaint, "Del Junco advised Hawkins of the company's position as stated by McNaughton. Hawkins was expected to testify on April 13, 1989. He indicated to del Junco that he was uncomfortable because of the company's position and reluctant to testify".

The complaint went on the say:

"Del Junco approached McNaughton on April 13, 1989, before the hearing resumed. He expressed the union's

concern about the company's said position and he requested that McNaughton withdraw the said position on behalf of his client. Del Junco advised that the incident would be forgotten if the company would undertake that no reprisals would be taken against Hawkins as a result of his evidence. McNaughton responded that the company's position was unchanged and he repeated the threat that Hawkins would be discharged if his evidence were to be inconsistent. Del Junco asked what the company's position would be if Hawkins did not testify; McNaughton responded that he would not be discharged as there would be no reason to believe that Hawkins had not been honest with the company in July 1988."

According to the Teamsters, the parties then explained to the arbitration board their respective positions and asked for, and received, an adjournment of the arbitration, pending a resolution of the matter.

In its reply to the complaint, the company largely confirmed the basic facts as set out by the union, although it elaborated on them somewhat in the following words:

"Mr. McNaughton ... then confirmed to Mr. del Junco that the Company's position was unaltered, that Mr. Hawkins was free to testify as he wished and say anything he wished, however, if his testimony was inconsistent with what he had told the investigator in order to retain his job, i.e. if he now said he was 'rolling' C.O.D. monies, Mr. Hawkins' employment would be terminated in accordance with the Company's policy on employees 'rolling' C.O.D. monies and for breach of the Company's honesty policy in that he had lied to the investigator in July of 1988.

The Respondent confirms that when Mr. del Junco asked what would happen if Mr. Hawkins did not testify, Mr. McNaughton responded that there would be no evidence contrary to what Mr. Hawkins had told the investigator in July and that the Company would thus have no basis to discharge Mr. Hawkins as there would be no evidence that he had not been honest with the Company in July of 1988."

The foregoing pages, covering Mr. Virgin's testimony, and then on to this last segment quoted from the Company's reply, constitute the basic facts before the Board.

Section 98(4) of the Code reads as follows:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Because of the burden imposed by this section, the Board's procedural policy for a hearing is to have the employer present first its case against the complaint. In this instance, U.P.S. proceeded to do that and, as we have said, its sole witness was Mr. Virgin. After he had been examined in chief, cross-examined and briefly re-examined, Mr. McNaughton advised that this constituted the company's presentation of its case.

Mr. Luce, representing the Teamsters, urged the Board itself to call as a witness (or order the employer to call as a witness) the person who had investigated Mr. Hawkins' alleged roll-over case in July 1988. The Board suggested that Mr. Luce was quite at liberty to call this person as a witness, or any other person, that it was up to him to present the union's case. Mr. Luce decided, however, to call no witnesses and presumably to let the complaint speak for itself. We infer that Mr. Luce's reluctance to call this person related to some procedural disadvantage he felt he would be in if, technically, he could not cross-examine the individual. However, the Board's position is that the respondent and the complainant were basically responsible for the presentation of their respective cases and it was not for the Board to set itself up on behalf of one or the other as a kind of grand inquisitor.

III

In the absence of evidence to the contrary, the picture of

what was in the company's mind seems reasonably clear. When they heard and responded to Mr. del Junco's outline of how Mr. Hawkins was expected to testify before the arbitrator, the company's representatives were concerned that their decision to continue to employ Mr. Hawkins was now going to be used against them in the defence of Mr. Britton (the grievor at the arbitration). The company had earlier decided not to dismiss Mr. Hawkins because its investigation of his handling of C.O.D. monies and his statements to the investigator had led it to conclude that he had not been "rolling" C.O.D. funds. Now it seemed that Mr. Hawkins was about to testify under oath that he had in fact rolled those funds. Moreover, Teamsters counsel proposed to put this testimony forward as part of an endeavour to show to the arbitrator that "rolling" was a practice which the company had tolerated in the past (in Mr. Hawkins' case) and therefore Mr. Britton, the grievor in the arbitration, should not have been dismissed.

This obviously generated a degree of anger in the company's representatives. So, through the company's counsel, notice was served on the Teamsters counsel that if the testimony before the arbitrator - and presented under oath - now demonstrated that Mr. Hawkins had been allowed to retain his job on the basis of falsehoods, he would be let go for having violated the company's long-standing and established "honesty in employment policy". (A copy of this policy, signed by Mr. Hawkins, was filed by U.P.S. with the Board.)

There is no evidence before the Board that the employer's action in serving the foregoing notice was based in any way upon "anti-union animus", that its response to the union's indication of how Mr. Hawkins would testify was motivated even in the smallest part by any desire to get at Mr. Hawkins or the Teamsters for any reason associated with

union activity per se. The sole reason for the employer's action seems to have been its determination not to let somebody have an unfair advantage over it based upon action it had taken earlier, which was itself based upon a decision to believe the word of an employee - which apparently now was going to be claimed by that employee as having been false.

In the final analysis, if the facts are as they have been set out here - and there is no evidence to challenge these findings - the employer's reaction to Mr. del Junco's outline of how Mr. Hawkins would testify and for what purpose, is perfectly understandable. Any reasonable employer would suffer a justified attack of ire in the face of such apparent double-dealing.

Moreover, it was much more civilized of the employer to lay its cards on the table privately to union counsel in advance and let him judge how he should proceed, in the light of the facts which the company apparently had in its possession, than to allow the testimony to take its course, meanwhile lying in wait to fire Mr. Hawkins when it was all over. Then, of course, everybody would have been put to the further expense of a second arbitration over Mr. Hawkins' dismissal. Based upon our experience of industrial relations, we are inclined to feel that what the company did could actually be characterized as consistent with good industrial relations.

In spite of the foregoing findings and comments, we must still answer certain questions: Did U.P.S. violate sections 94(1)(a), 94(3)(a), 94(3)(b), 94(3)(e), 94(3)(f) and 96?

In the light of what the company in fact did and our view

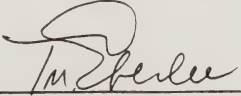
of why it did that, we cannot come to the conclusion that this constitutes illegal interference of the type prohibited by section 94(1)(a). We make the general statement, without believing it necessary to cite the chapters and verses, that there is nothing in the Board's jurisprudence which would support a finding that this could be interpreted as being in violation of section 94(1)(a).

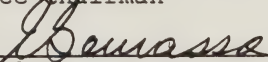
As for section 94(3)(a) which prohibits intimidation or threats designed to prevent a person from testifying or to cause a person to alter his or her testimony, we do not interpret what the company has done as falling within such a prohibited category.

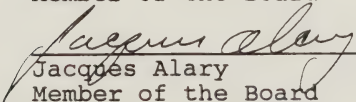
By no stretch of the imagination could the employer be deemed to have violated section 94(3)(b). The employer has not sought to "impose any condition in a contract of employment" contrary to that section.

Again, having regard to the facts and our sense of the meaning of those facts, we find it impossible to construe the company's behaviour as being in violation of section 94(3)(e). Finally, neither section 94(3)(f) nor section 96 has applicability to the facts of the case.

Our conclusion is the complaint must be dismissed.


Thomas M. Eberlee
Vice-Chairman


Evelyn Bourassa
Member of the Board


Jacques Alary
Member of the Board

DATED at Ottawa, this 21st day of February 1990.

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Summary

MR. ROLAND LEBLANC, EMPLOYEE, VIA
RAIL CANADA INC., EMPLOYER, AND
MR. WAYNE SNYDER, SAFETY OFFICER.

Board File: 530-1776

Decision No.: 783

Résumé de décision

M. ROLAND LEBLANC, EMPLOYÉ, VIA
RAIL CANADA INC., EMPLOYEUR, ET
M. WAYNE SNYDER, AGENT DE SÉCURITÉ.

Dossier du Conseil: 530-1776

Décision n°: 783

This is a referral from the Board,
sitting in plenary session, to the
original panel, for reconsideration
of a decision in file 950-93
(Roland LeBlanc (1988), as yet
unreported CLRB decision no. 714).
That decision dealt with a referral
of a safety officer's decision to
the Board pursuant to section
129(5) of the Canada Labour Code
(Part II (Occupational Safety and
Health)).

In particular, the full Board asked
the original panel whether it had
before it a decision rendered by
a safety officer within the meaning
of section 129(5) of the Code.

Upon reconsideration, the Board
found that it did not have before
it a decision within the meaning
of section 129(5) of the Code and
revoked all remedies issued in its
decision no. 714 in view of its
lack of jurisdiction over the
matter.

Il s'agit d'une demande de réexamen
présentée par le Conseil réuni en
séance plénière au groupe original
d'une décision dans le dossier
950-93 (Roland LeBlanc (1988),
décision du CCRT n° 714, non encore
rapportée). Cette affaire portait
sur une demande de révision con-
cernant une décision rendue par un
agent de sécurité en vertu du
paragraphe 129(5) du Code canadien
du travail (Partie II - Sécurité
et santé au travail).

En particulier, la plénière a
demandé au groupe original de
déterminer s'il était saisi d'une
décision rendue par un agent de
sécurité au sens du paragraphe
129(5) du Code.

Après réexamen, le Conseil a décidé
qu'il n'était pas saisi d'une
décision au sens du paragraphe
129(5) du Code et a annulé toutes
les mesures de redressement
énoncées dans sa décision n° 714,
n'ayant pas compétence dans cette
affaire.



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Reasons for Decision

Mr. Roland LeBlanc,
employee,
and
VIA Rail Canada Inc.,
employer,
and
Mr. Wayne Snyder,
safety officer.

Board File: 530-1776

The Board consisted of Mr. J. Jacques Alary, Member, sitting as a single member panel, pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Counsel of record:

Mr. T.N. Stol, for the Canadian Brotherhood of Railway, Transport and General Workers; and
Mr. Domenic Scalia, for VIA Rail Canada Inc.

These Reasons for decision were written by Mr. J. Jacques Alary, Member.

On November 18, 1988, the Board rendered a decision in file 950-93 (Roland LeBlanc (1988)), as yet unreported CLRB decision no. 714) which dealt with a referral of a safety officer's decision to the Board pursuant to section 129(5) of the Canada Labour Code - Part II (Occupational Safety and Health).

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within

seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

In decision no. 714, the Board said:

"Mr. Snyder based his decision that no danger existed on the fact that Mr. LeBlanc, because he did not report to work, was not in a position to evaluate the temperature and conclude that a condition of extreme heat prevailed in the dining car. He based his decision on the information provided by Mr. LeBlanc and his supervisor, Mr. A.G. Soward. He did not ask anyone to measure the temperature in the dining car in order to determine if it was really too hot to work in the kitchen of the dining car on that particular day. It is noted that Mr. Snyder stated, in his decision of July 29, 1988, that 'the right to refuse in this case has been denied'.

In my respectful opinion, Mr. Snyder has no jurisdiction as a safety officer under Part IV of the Code to make such a decision. His authority extends only to the question of whether danger exists or does not exist.

In the absence of a proper finding by the safety officer, I will exercise my authority under sections 87(b) and 102(2) of the Code to properly answer the question that was before the safety officer."

(page 9)

A summit panel of the Board met on October 30, 1989 to determine if the decision should be reviewed.

The summit came to the following conclusion:

"Having regard to the principles set out in the Wardair Canada (1975) Ltd. (1983), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434); Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580); and Canadian Broadcasting Corporation (1987), 70 di 132 and 17 CLRBR (NS) 43 (CLRB no. 636) cases, it is the view of the summit panel that the question of review of the decision in the Roland LeBlanc case should be submitted to the full Board, sitting in plenary session."

The Board met in plenary on December 11, 1989 and decided to send the Roland LeBlanc, supra, decision back to the original panel for reconsideration. In particular, the plenary asked the original panel whether it had before it a decision by a safety officer within the meaning of section 129(5) of the Code.

"In particular, the full Board has decided that the original panel should determine the question whether or not there was in fact the necessary jurisdictional basis for the inquiry conducted by the Board: that is, was there before the Board a decision by a safety officer within the meaning of section 129(5) of the Canada Labour Code.

The matter has, accordingly, been remitted to the original panel for determination of the foregoing question. You will be advised shortly by the original panel as to the procedure to be followed."

The Board invited the parties to make further submissions following the plenary, but only VIA Rail ("VIA" or the "employer") replied. This decision takes these submissions into account along with all of the relevant material.

I

Facts

On July 27, 1988, VIA assigned Mr. Roland LeBlanc to the kitchen of a dining car. Without reporting for work, Mr. LeBlanc phoned his supervisor and stated that the extreme heat in the car constituted a danger for him and that he could not work. Mr. LeBlanc had in his possession a doctor's report concluding that "it would certainly be advisable that this patient avoid areas where he would have exposure to extreme heat." Mr. LeBlanc feared that working in the rail car on July 27, 1988 would have exposed him to such extreme heat.

Two days later, the parties contacted and met with Mr. Wayne Snyder, a safety officer, within the meaning of section 129(1) of the Code. They discussed the circumstances surrounding the refusal, including the medical condition affecting Mr. LeBlanc.

On August 3, 1988, Mr. Snyder issued a written decision confirming his July 29, 1988 oral comments. The decision concludes as follows:

"It is my decision based on the above, along with information provided by Mr. LeBlanc and his supervisor Mr. Al Soward, that the circumstances whereby Mr. Roland LeBlanc invoked his 'Refusal to work' have revealed that he would not have been in a position to do so, as he had not reported to work, and therefore, was not able to determine the actual temperature and conclude if a condition of extreme heat actually existed in the dining car.

The working conditions which normally exist in the kitchen of a dining car would be considered as inherent and therefore no refusal would be permitted as per subsection 85(2)(b) [now section 128(2)(b)].

Therefore, the Right to Refuse in this case has been denied, as well, the employer is herein reminded of the general prohibitions contained in Section 104 of the Code [now section 147]."

(emphasis in the original decision)

At Mr. LeBlanc's request, the safety officer referred this decision to the Board for review pursuant to section 129(5) of the Code. The safety officer, at the conclusion of his letter, said that the decision could be so referred and he must have therefore assumed the Board had jurisdiction to review his findings.

II

Was the decision of the safety officer a decision within the meaning of section 129(5)?

The issue in this case is not if Mr. Snyder rendered a decision, he clearly did. But was it a decision that the Board had the authority to review? Upon reconsideration, I find that it did not.

When does a safety officer's decision come within the Board's review power? It is clear that not all safety officer decisions are within this Board's jurisdiction. Section 129(5) of the Code limits our jurisdiction to situations where the safety officer finds that no danger exists.

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

(emphasis added)

On the other hand, if he finds that danger exists, then the proper appeal route is to the regional safety officer (section 146(1)):

"146.(1) Any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated."

Did the safety officer's decision in this case find that there was no danger? The facts reveal that the safety officer met with the parties on July 29, 1988, two days after Mr. LeBlanc invoked his right to refuse. Mr. Snyder discussed the reasons for the refusal and pointed out that Mr. LeBlanc had not been in a position to invoke his right to refuse since he had not been at work when the employer was made aware of his refusal.

The safety officer never inquired, however, if a condition had existed on July 27, 1988 in the dining car that constituted a danger within the meaning of section 128. Being called in two days after the fact makes such an investigation more difficult but certainly not impossible. Nevertheless, Mr. Snyder, instead of dealing with this problem, simply said that Mr. LeBlanc, since he was not at work, had never been in a position to refuse. Such a decision does not address the question of the existence of danger in the actual dining car, but rather a question of procedure.

Mr. Snyder's comments about dining car heat being "inherent" in Mr. LeBlanc's job and therefore not dangerous (section 128(2)(b)) were not based on an investigation of the actual situation on July 27, 1988. This general comment applied only to "working conditions which normally exist in the kitchen of a dining car." The issue in this case is not what "normally exists" but whether what actually existed on the day Mr. LeBlanc allegedly refused to report for work constituted a danger under the Code.

Can any finding by a safety officer that does not issue directions be read as a "decision" denying the existence of

a danger? With respect to those who hold the opposite view, I do not believe the Code can support such a proposition. For a safety officer to state, as was the case here, that an employee has not exercised his right to refuse work in accordance with the Code, and is not accordingly covered by such a provision cannot be characterized as a finding of no danger under section 129, nor can comments based on the "normal" situation in a dining car without regard for the specifics of the particular case being investigated.

The highlighted portion of section 129(5) cited above and sections 129(1) and (2) show that a "no danger" decision is one made after certain steps in the Code have been followed. Sections 129(1) and (2) state:

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision."

(emphasis added)

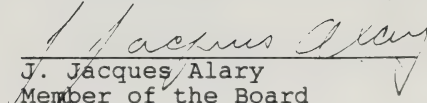
The safety officer in this case never made the decision required of him in the above section. He never got that far. The officer decided on procedural grounds that the employee could not legitimately invoke the right to refuse if he was

not at work. As well, he expressed an opinion that in normal conditions heat was an inherent part of Mr. LeBlanc's job. But nowhere can the Board find any investigation relating to the July 27, 1988 situation, let alone any finding on such facts. Without this investigation and the ensuing conclusions concerning danger, the Board cannot review the safety officer's decision.

In essence, to determine if the safety officer's decision comes within the Board's jurisdiction, one cannot simply look at whether the decision contains directions or not. Rather, one must go further and consider if the decision resulted from a safety officer's investigation into "the use or operation of a machine..." or from his finding that "a condition exists in the workplace..." which amounts to danger. In this case, even though the safety officer met the parties, he never rendered, in my view, a decision about the safety of the actual dining car.

This case has caused problems for all concerned. Mr. LeBlanc's refusal to report to work and the two-day delay before calling in the safety officer only served to aggravate the situation. It is clear that the safety officer thought the decision he rendered came within our review jurisdiction. I hope the reasons given in this case for finding that it does not will assist him and the parties in the future for other investigations and decisions. I am not deciding whether the safety officer had the authority to make the decision he did, for such decisions are excluded from the Board's review authority under the Code.

The Board accordingly revokes any orders issued in its reasons for decision no. 714 in view of its lack of jurisdiction over the matter.


J. Jacques Alary
Member of the Board

DATED at Ottawa this 12th day of March 1990.

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information

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Summary

CANADA POST CORPORATION, APPLICANT,
CANADIAN UNION OF POSTAL WORKERS,
RESPONDENT UNION, AND MESSRS. WAYNE
THISTLE AND S. BRUCE OUTHOUSE, MIS-
EN-CAUSE.

Board File: 610-111

Decision No.: 784

Ce document n'est pas officiel.
Les motifs de décision seulement
peuvent être utilisés aux fins
légales.

Résumé de Décision

SOCIÉTÉ CANADIENNE DES POSTES,
REQUÉRANTE, ET LE SYNDICAT DES
POSTIERS DU CANADA, INTIMÉ, ET MM.
WAYNE THISTLE ET S. BRUCE OUTHOUSE,
MIS-EN-CAUSE.

Dossier du Conseil: 610-111

No de Décision: 784

Referral by Canada Post Corporation
pursuant to section 65 of the
Canada Labour Code of a question
submitted to an arbitration board.
Application dismissed.

The Federal Court of Appeal has
already determined that by virtue
of the Postal Services Continuation
Act, 1867, which put an end to a
strike in the fall of 1987, the
collective agreement was in force
at the time of the work stoppage.
The Court specified however that
its decision must not give rise to
"retroactive illegality."

Grievances were filed concerning
the refusal to grant payment of
sick leave during the strike.
Canada Post maintains that it
unilaterally altered the conditions
of employment, including those
governing sick leave, during the
strike. Canada Post seeks the
following determination by the
Board:

(i) Whether the unilateral
alteration by the Employer of the
terms and conditions of work and
thus, the non-compliance by the
Employer with the expired
Collective Agreement was a lawful
act at the time it was taken; and,
if so

Demande présentée par la Société
canadienne des postes visant le
renvoi au Conseil d'une question
soumise à un tribunal d'arbitrage.
Code canadien du travail (article
65). Requête rejetée.

La Cour d'appel fédérale a déjà
décidé qu'en vertu de la Loi sur
le maintien des services postaux,
Lois du Canada, c.40, qui avait mis
fin à une grève à l'automne 1987,
la convention collective était en
vigueur lors de l'arrêt de travail.
La Cour a cependant jugé que
pareille décision ne devait pas
donner lieu à des illégalités
retroactives.

Des griefs ont été déposés
concernant le refus de payer les
congés de maladie durant la grève.
La Société des postes prétend avoir
unilatéralement modifié les
conditions de travail durant la
grève, notamment celles relatives
à cette question. Dans ce dossier,
la Société demande au Conseil de
se prononcer sur les questions
suivantes:

i) La modification unilatérale des
conditions de travail était-elle
légale au moment où elle a eu lieu?



(ii) Whether the failure by the Employer to abide by the terms of the expired Collective Agreement during the period from September 30, 1987 to October 17, 1987 resulted, as a consequence of the Postal Services Continuation Act, 1987, in retroactive violations of the Collective Agreement; and if so

(iii) Whether such "retroactive violations" of the Collective Agreement, of which the grievances set out below are examples, are instances of the "retroactive illegality" referred to by the Federal Court of Appeal in its decision dated March 13, 1989, and thus not violations for which redress ought to be granted.

The application is dismissed. This question is not included in the scope of section 65 of the Code. In addition, the arbitrator has full jurisdiction to determine whether or not a grievance is arbitrable (section 60(1)(b)).

ii) Le défaut de l'employeur de respecter, durant la grève, la convention échuë en constitue-t-il une violation rétroactive?

iii) Cette violation rétroactive constitue-t-elle le genre d'illégalité rétroactive à laquelle la Cour fédérale a fait allusion?

La demande est rejetée. Ce genre de question n'est pas visée par l'article 65 du Code. De plus, l'arbitre a pleinement compétence pour déterminer si le grief est susceptible d'arbitrage (article 60(1)b)).

Reasons for decision

Canada Post Corporation

applicant,

*Canadian Union of Postal
Workers*

respondent,

and

*Professor Wayne Thistle
and*

*Mr. S. Bruce Outhouse, Q.C.
Arbitrators*

mis-en-cause

Board File: 610-111

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. Jacques Alary and Michael Eayrs, Members.

These reasons for decision were written by Vice-Chairman Brault.

Counsel on record:

Mr. David I. Wakely, for Canada Post;

Ronald A. Pink, for the Canadian Union of Postal Workers.

I

The Board has considered in camera the above application filed by Canada Post ("the employer") in December 1989 pursuant to section 65 of the Canada Labour Code (Part I - Industrial Relations) in connection with certain grievances filed in Atlantic Canada by the respondent union, the Canadian Union of Postal Workers ("the union or CUPW"). Even though the employer requested a hearing, the Board did not find it was warranted given all the written submissions on record.

Section 65(1) reads as follows:

" 65(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination."

II

The application

Canada Post seeks the following determination by the Board:

"(i) Whether the unilateral alteration by the Employer of the terms and conditions of work and thus, the non-compliance by the Employer with the expired Collective Agreement was a lawful act at the time it was taken; and, if so

(ii) Whether the failure by the Employer to abide by the terms of the expired Collective Agreement during the period from September 30, 1987 to October 17, 1987 resulted, as a consequence of the Postal Services Continuation Act, 1987, in retroactive violations of the Collective Agreement; and if so

(iii) Whether such 'retroactive violations' of the Collective Agreement, of which the grievances set out below are examples, are instances of the 'retroactive illegality' referred to by the Federal Court of Appeal in its decision dated March 13, 1989, and thus not violations for which redress ought to be granted."

The employer states that certain grievances were filed following alleged violations of CUPW's collective agreement during the period from September 30, 1987 to October 17, 1987. During that time, the union was engaged in rotating strike action while the employer,

still operating, says it unilaterally altered the terms and conditions of work of the employees represented by CUPW.

The dispute opposing CUPW and Canada Post eventually came to an end when Parliament adopted the Postal Services Continuation Act (1987), Statutes of Canada, c. 40.

The grievances that gave rise to this application deal with non-disciplinary issues, such as sick leave pay or holiday pay. In the grievors' view, they are entitled to such payments under their collective agreement. Canada Post takes the view that no provision in the collective agreement allegedly in place at the time is applicable to the grievors claims.

All the grievances described earlier have been referred to arbitration and are currently pending: one case is before arbitrator Wayne Thistle of St. John's (NFLD), and six other cases are before arbitrator S. Bruce Outhouse of Halifax (N.S). Neither of these gentlemen has yet stayed the proceedings engaged before him, even though each is currently considering a request made to that effect by Canada Post pursuant to section 65(2) of the Code.

III

Background

One cannot properly understand the true purpose of this application without some knowledge of the background to those grievances referred to arbitration.

The senior labour relations officer of the Board assigned to this case thoroughly researched the matter and reported it to the parties as well as to the Board. It is appropriate to quote at length what Mr. MacIsaac had to say on the matter in his report:

"After collective bargaining talks between CUPW and Canada Post broke down in September and October 1987, CUPW began a series of rotating strikes against Canada Post. On October 17, 1987, the Federal Parliament passed into law the Postal Services Continuation Act, 1987, which ordered an immediate end to all strike-related activities and ordered binding mediation-arbitration to settle the terms of the collective agreement. The legislation also provided that:

'5.(1) The term of the collective agreement is extended to include the period beginning on October 1, 1986 and ending on a date to be fixed by the mediator-arbitrator, which date shall not be earlier than September 30, 1988 or later than September 30, 1989.'

Following the period October 1 through October 17, 1987, CUPW filed several grievances against Canada Post, alleging violations of various sections of the collective agreement, relating to actions and circumstances which occurred both before and during the period October 1 through October 17, 1987. Canada Post refused to handle the grievances and took the position that no collective agreement was in effect during the period October 1 to October 17, 1987.

Consequently, on January 8, 1988, CUPW filed a complaint with the Board against Canada Post alleging that Canada Post was in violation of Sections 184, 184(1)(a), 184(3)(a)(vi), and 184(3)(b) and (e) of the Code (now Sections 94, 94(1)(a), 94(3)(a)(vi), and 94(3)(b) and (e), respectively) [Board File No. 745-2827].

On January 12, 1988, CUPW referred several of the above-noted grievances to arbitration. On the same date, January 12, 1988, CUPW filed an application pursuant to Section 158 (now Section 65) of the Code, asking the Board to determine whether or not a collective agreement was in force between CUPW and Canada Post for the period October 1 to October 17, 1987 [Board File No. 610-81].

On January 25, 1988, CUPW asked the Board to withhold the processing of its complaint [Board File No. 745-2827] until such time as the Board had made a decision on CUPW's Section 158 (now Section 65) application.

The Board rendered a decision on CUPW's referral application on April 29, 1988 [Canadian Union of Postal Workers (1988), Board decision No. 690, unreported], and found "that the collective agreement was in force during the period October 1, 1987 to October 17, 1987.

On May 5, 1988, Canada Post initiated review proceedings against Canadian Union of Postal Workers, supra, under Section 28 of the Federal Court Act.

On May 20, 1988, Canada Post filed an application for review with the Board pursuant to Section 119 (now Section 18) of the Code asking the Board to reconsider Canadian Union of Postal Workers, supra [Board File No. 530-1616].

Between July and October 1988, as grievances filed by CUPW during or related to the period October 1 to 17, 1987, were referred to arbitration by CUPW, Canada Post filed four (4) referral applications pursuant to Section 158 (now Section 65) of the Code, each time asking the Board to determine whether a collective agreement was in force between CUPW and Canada Post between the period October 1 and October 17, 1987. The applications filed were as follows:

| <u>Board File Number</u> | <u>Date Filed</u> |
|--------------------------|-------------------|
| 610-90 | July 4, 1988 |
| 610-91 | July 25, 1988 |
| 610-92 | August 8, 1988 |
| 610-94 | October 4, 1988 |

On October 17, 1988, the Board released its decision in Canada Post's July 4, 1988, referral application [Board File No. 610-90]. The panel disagreed with the findings of the Board panel in Canadian Union of Postal Workers, supra, in that this panel "would answer the question posed by Canada Post Corporation in its Section 158 referral in the negative." Instead of issuing an order to that effect, the panel decided to refer the question giving rise to these proceedings to the Federal Court of Appeal Canada Post Corporation (1988), Board decision no. 710, unreported. The Board also asked the Federal Court to include the [review proceeding] of Canadian Union of Postal Workers, supra in the proceedings when considering the referral of Canada Post Corporation, supra.

...

From October 1988, to February 1989, Canada Post continued to file referral applications pursuant to Section 158 (and after the Code was renumbered, Section 65) of the Code as CUPW's grievances relating to the October 1 through October 17, 1987, period were referred to arbitration. Canada Post filed the following additional referral applications:

| <u>Board File Number</u> | <u>Date Filed</u> |
|--------------------------|-------------------|
| 610-95 | November 28, 1988 |
| 610-96 | December 1, 1988 |
| 610-101 | January 6, 1989 |
| 610-102 | January 17, 1989 |
| 610-103 | January 30, 1989 |
| 610-104 | January 30, 1989 |
| 610-105 | February 1, 1989 |

Canada Post also requested and the Board ordered in most of the above referral applications, stays of arbitration proceedings pending the decision of the Federal Court in the Board's referral of Canada Post Corporation, supra.

Meanwhile, solicitors for Canada Post and CUPW came to an agreement to put aside the grievance related to Canada Post's referral application filed January 6, 1989 [Board File No. 610-101], pending the Federal Court of Appeal's decision on the Board's referral of Canada Post Corporation, supra. Accordingly, on January 10, 1989, Canada Post asked the Board's permission to withdraw that application. On February 2, 1989, the Board granted Canada Post leave to withdraw the application and the file was closed.

On March 13, 1989, the Federal Court of Appeal issued its decision in the referral put to it by the Board in Canada Post Corporation, supra. The Federal Court considered and answered the following question:

Question - "whether the Postal Services Continuation Act, 1987, had the effect of reviving the expired collective agreement between Canada Post Corporation and the Canadian Union of Postal Workers and binding the parties with all of the terms and conditions thereof, during the period of October 1, 1987 to October 17, 1987?"

Answer - "yes, to the degree that the revised collective agreement respects the legality of the strike and does not give rise to 'retroactive illegality' as discussed in the reasons for decision." (Federal Court File No. A-1102-88)

On April 24, 1989, the Board closed the file on Canada Post's application for reconsideration of Canadian Union of Postal Workers, supra [Board File No. 530-1616], in light of the fact that the Board's original decision was not inconsistent with the decision of the Federal Court.

In April 1989, Canada Post asked the Board's permission to withdraw its referral application filed December 1, 1988 [Board File No. 610-96], as the related grievance had been rejected by an arbitrator. On April 25, 1989, the Board granted Canada Post permission to withdraw the application and closed the file.

On April 25, 1989, Canada Post filed a request for leave to appeal the March 13, 1989, decision of the Federal Court of Appeal in the Board's referral of Canada Post Corporation, supra (Court File No. A-1102-88), to the Supreme Court of Canada.

On April 26, 1989, in relation to Canada Post's referral application filed February 2, 1989 [Board File No. 610-105], the Board ruled that, firstly, since the Federal Court had answered the question referred to the Board by Canada Post, the Board could not rely on Section 65(2) to further stay the arbitration proceedings. Secondly, no sound labour relations purpose could be served by further delaying arbitration proceedings. The Board closed the file.

On April 27, 1989, the Board determined that the question referred by Canada Post to the Board in Board file numbers 610-92, 610-94, 610-95, 610-102, 610-103, and 610-104, had been answered by the Federal Court of Appeal in its file A-1102-88. Accordingly, the Board lifted the stay of arbitration proceedings in all of the above files and closed the files.

With the Board's disposition of the above referral applications, the only Board file still open in relation to the October 1 to 17, 1987, postal strike was CUPW's complaint filed January 8, 1988 [Board File No. 745-2827].

On May 26, 1989, CUPW requested the Board's permission to withdraw the complaint. On June 1, 1989, Canada Post disagreed and asked the Board to schedule the complaint for a hearing before the Board. On June 6, 1989, the Board granted CUPW's permission to withdraw the complaint and closed the Board's file in the matter.

On August 31, 1989, Canada Post's request for leave to appeal the Federal Court of Appeal's decision number A-1102-88 to the Supreme Court of Canada was dismissed with costs.

On December 15, 1989, Canada Post filed this application."

IV

The parties' submissions

Canada Post is of the opinion that the Board should answer the three questions the employer has raised, since

the response to these questions could impact on the arbitrators' answers.

On the other hand, the thrust of the union's argument is that the Board does not have jurisdiction under section 65 to answer these questions since they do not relate to issues that can be the object of a referral under that provision.

V

Decision

This case is in some ways similar to the case of CJMS Radio Montréal (Québec) Ltée (1979), 34 di 803; [1980] 1 Can LRBR 170 (CLRB no. 183). This latter case followed the settlement by the Board of a first collective agreement pursuant to then section 171.1, Part V of the Code (now section 80(1), Part I).

A few months after the Board imposed a collective agreement, the employer filed an application pursuant to then section 158 (now section 65) "...for instructions and determination...". The employer was asking for instance a ruling as to whether or not individual employees were entitled to job security. The Board characterized the employer's application "...as a request that the Board interpret the text of the collective agreement that it imposed on the parties" and declined to answer such questions:

"With respect to the text of section 158, none of the allegations or conclusions sought relate to (a) the existence of a collective agreement, (b) the identification of the parties, or (c) the identification of the employees bound by the collective agreement. In this case, it is

clear that a collective agreement exists, who the parties to the said collective agreement are, and which employees are bound by the collective agreement."
(p. 809)

The same is true in this case. What Canada Post is in fact asking us is to determine whether some issues are arbitrable or not. Such a matter falls squarely within an arbitrator's statutory jurisdiction.

"60(1) An arbitrator or arbitration board has

...

(b) power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable."

This in itself is sufficient to dismiss Canada Post's application. Further, the Board has determined in Northern-Loram Joint Venture (1985), 59 di 180; 9 CLRBR (NS) 218 (CLRB no. 498), that the Board's jurisdiction under section 65 is not exclusive and that an arbitrator has the authority to answer the questions that may rightfully be referred to the Board under section 65. In this case, the Board in fact adopted the analysis of Mr. G. Adams, acting as arbitrator in Re Bell Canada and Communications Workers of Canada (1980), 27 L.A.C. (2d) 163:

"The outcome to this grievance is very dependent on the meaning to be given to the various provisions of the Canada Labour Code. There is nothing contrary to principle in a board of arbitration construing a statute that bears on its mandate, although the standard of judicial review on its determination of a statute's meaning is a much stricter standard: see Re U.S.W., Local 2894, and Galt Metal Industries Ltd. (1974), 5 L.A.C. (2d) 336, 46 D.L.R. (3d) 150, [1975] 1 S.C.R. 517, sub nom. McLeod et al. v. Egan et al. (S.C.C.); Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al. (1978), 94 D.L.R. (3d) 161, [1979] 1 S.C.R. 846, 79 CLLC para. 14,189 (S.C.C.)..."

(p. 170)

The Board concluded as follows:

"...it is clear we have no jurisdiction under section 158 to determine how a collective agreement applies (Radio CJMS Montréal (Québec) Ltée, supra)."

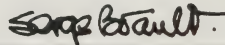
(Northern-Loram Joint Venture; p. 209)

VI

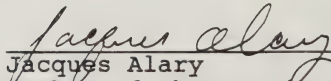
Conclusion

The questions referred to the Board not being of the nature of those contemplated by section 65, Canada Post's application is dismissed.

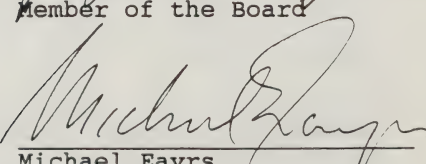
In view of the numerous referrals made on similar issues over the last few years, the Board feels entitled to remind the parties that sound labour relations are always better served by ways that speed up the resolution of differences. We do not believe that further referrals of this nature would qualify in the latter category.



Serge Brault
Vice-Chairman



Jacques Alary
Member of the Board



Michael Eayrs
Member of the Board

DATED at Ottawa, this 16th day of March 1990

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Summary

MOFFAT COMMUNICATIONS LIMITED,
APPLICANT EMPLOYER, AND NATIONAL
ASSOCIATION OF BROADCAST EMPLOYEES
AND TECHNICIANS, RESPONDENT UNION.

Board File: 530-1787

Decision No.: 785

In this application for reconsideration it was contended first, that an interim certification order expressly stated to be subject to the right of the Board to redefine the bargaining unit once it had disposed of a related application for review was beyond the scope of the Board's powers under Section 20 of the Code; and second, that a certification order to come into force at a later date was a "prospective" order which the Board had no jurisdiction to issue.

The "summit" panel held, on the first question, that there had been two issues before the Board, and that its decision to defer final determination of one of these, namely the appropriateness of the bargaining unit in the light of the facts to be set out in a related application, was appropriate. It was noted that the scope of the bargaining unit was a subject which it was open to the Board to review in any event. On the second question, it was held that the Board did indeed have the power under Section 20 of the Code to give a delayed effect to its decision; that it did so in the instant case on the basis of practical considerations; and that there were no grounds for referring the matter to a plenary session of the Board. The application for reconsideration was dismissed.

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Résumé de décision

MOFFAT COMMUNICATIONS LIMITED,
EMPLOYEUR REQUÉRANT, ET
L'ASSOCIATION NATIONALE DES
EMPLOYÉS ET TECHNICIENS EN RADIO-
DIFFUSION, syndicat intimé.

Dossier du Conseil: 530-1787

Décision n°: 785

Dans la présente demande de reconsidération, le requérant soutient d'une part que le Conseil a outrepassé les droits que lui confère l'article 20 du Code en rendant une ordonnance d'accréditation provisoire dans laquelle il se réservait le droit de redéfinir l'unité de négociation une fois qu'une demande de révision connexe avait été réglée et d'autre part que l'ordonnance d'accréditation devant entrer en vigueur à une date ultérieure constituait une ordonnance «éventuelle» pour laquelle le Conseil n'avait pas compétence.

Pour ce qui est de la première question, le Comité au sommet a statué que le Conseil avait été saisi de deux points litigieux qu'il avait eu raison de différer l'une de ces décisions, soit la détermination de l'unité de négociation, en attendant de connaître les faits liés à une demande connexe. Le Comité a fait remarquer que, de toute façon, le Conseil avait le pouvoir de reconsidérer la composition de l'unité de négociation. Pour ce qui est de la deuxième question, il a été déterminé que l'article 20 du Code confère effectivement au Conseil le pouvoir de reporter l'entrée en vigueur de sa décision, que des considérations pratiques l'ont amené à procéder ainsi dans ce cas et que rien ne justifie le renvoi de l'affaire au Conseil réuni en plénière. La demande de reconsidération est donc rejetée.



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Reasons for decision

Moffat Communications Limited,
applicant,

and

National Association of
Broadcast Employees and
Technicians,
respondent.

Board File: 530-1787

The Board consisted of Chairman J.F.W. Weatherill and Vice-Chairmen Hugh R. Jamieson and Thomas M. Eberlee.

The reasons for decision were written by J.F.W. Weatherill, Chairman.

Written submissions were received on December 4, 1989, January 4, 1990 and January 10, 1990.

Appearances

D.G. Newman for the applicant, Moffat Communications Limited; and

D.J. Rogers for the respondent, National Association of Broadcast Employees and Technicians.

This is an application for review, pursuant to section 18 of the Canada Labour Code, of two decisions of the Board leading to certification orders dated September 29, 1989 (Board File No. 555-2927) and October 30, 1989 (Board File No. 530-1731).

In File No. 555-2927 the Board issued an Interim Certification Order certifying the National Association of Broadcast Employees and Technicians as bargaining agent for a unit of employees of Moffat Communications Limited (and no issue arises with respect to the Board's determination

of the bargaining unit or its assessment of the membership evidence), subject to the right of the Board to redefine the bargaining unit once it had disposed of an application for review (Board File No. 530-1731) which affected the same employees (as well as others) and which had been brought by the same trade union.

The Board's power to review and to "redefine" bargaining units arises clearly under section 18 of the Canada Labour Code, and has been exercised on a great many occasions. It is a natural attribute of the Board's general powers in respect of the determination of units of employees appropriate for collective bargaining.

In its Order dated October 30, 1989, in File No. 530-1731, the Board rescinded Certification Orders dated June 8, 1961 and March 2, 1962, as amended by Order dated January 14, 1975, and rescinded as well the Interim Certification Order dated September 29, 1989 (in File No. 555-2927). Those Orders were replaced by the Order issued on October 30, 1989 (in File No. 530-1731), certifying the respondent as bargaining agent for the unit of employees then found to be appropriate.

In the present application for review of those decisions and Orders, the applicant does not put forward any new allegations of fact, nor any allegations in respect of any facts which it could not reasonably have been expected to put forward at the times the decisions in question were before the Board. As we have noted, the Board's determinations as to the units of employees appropriate for collective bargaining, and its findings made in respect of the evidence of membership before it at the material times are not in issue. Those determinations and findings are with respect to questions involving either the exercise of

discretion or the establishment of matters of fact. These do not involve, in the circumstances of the instant case, questions of general policy which would call for consideration by the full Board in plenary session.

With respect to the Interim Certification Order dated September 29, 1989 (File No. 555-2927), it is the applicant's position that the Board, which in that case purported to act pursuant to its powers under section 20(1) of the Canada Labour Code, did not properly exercise its powers under that section. Section 20 of the Code is as follows:

"20.(1) Where, in order to dispose finally of an application or complaint, it is necessary for the Board to determine two or more issues arising therefrom, the Board may, if it is satisfied that it can do so without prejudice to the rights of any party to the proceeding, issue a decision resolving only one or some of those issues and reserve its jurisdiction to dispose of the remaining issues.

(2) A decision referred to in subsection (1) is, except as stipulated by the Board, final.

(3) In this section, "decision" includes an order, a determination and a declaration."

It is to be remembered that by section 18 of the Code the Board "may review, rescind, amend, alter or vary any order or decision made by it". In a sense then, it might be said that the Board's Interim Decision simply served, among other things, to put the parties on notice that the bargaining unit determined at that point to be appropriate might well be altered when the other application, already before the Board, was considered. Quite apart from this, however, we are of the view that the original panel, in its Interim Decision, was perfectly justified in invoking section 20 of the Code. There was indeed, as in such matters there often is, more than one issue to be determined, and the original panel, for sound labour relations reasons expressed in its

decision, decided to defer the final determination of one of these issues, namely the appropriateness of the bargaining unit in the light of the facts to be set out in a related application before the Board. The Board was, as is implicit in their decision, satisfied that it could do so without prejudice to the rights of any party, and in our view such rights were not prejudiced. The applicant's contention with respect to the Interim Decision of September 29, 1989 we find to be without merit.

Secondly, the applicant contends that the Board has no authority to issue what the applicant refers to as "prospective" orders. The Order dated October 30, 1989 (File No. 530-1731), after describing the revised bargaining unit which the Board found to be appropriate, included the following:

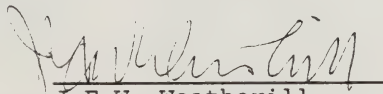
"pursuant to Section 20 of the Code and Section 25(3) of the Regulations, the instant Order shall come into force on the date a new collective agreement is signed between the National Association of Broadcast Employees and Technicians and Moffatt Communications Limited under the certification issued January 14, 1975 (file 530-39) or earlier, upon the request of either party."

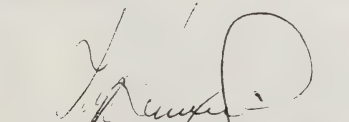
Section 25(3) of the Regulations, which provides that the effective date of an order of the Board shall, unless otherwise stated, be the date of the order contemplates, in our view, just such an Order as the Board issued here, in which it was provided, for the practical reasons which the Board set out in the letter to the parties in which its decision was embodied, that the effective date of the Order would be a date determinable in the future. The applicant has argued that the Board has created "enormous uncertainties" for the parties. In fact, it is clear from a reading of the Board's decision that it considered the


practical consequences of giving immediate and of giving delayed effect to its decision that an expanded bargaining unit was appropriate. The Board chose the course that it did for the reasons it gave. This is not, it should be added, a situation in which there can be said to have been "unanticipated consequences" in the sense in which the Board has used that expression elsewhere. The real thrust of the applicant's submissions, with respect, is that it seeks a reconsideration of the Board's determination with respect to the description of the bargaining unit. We see no grounds to justify our referring that question to a plenary session of the Board for review.

It is to be noted that at the conclusion of its letter to the parties, the Board drew their attention to the provisions of Section 67(1) of the Code and that in the Order itself, in the passage set out above, the Board advised the parties that they might apply to it to have an earlier effective date established. Thus, if difficulties of the sort feared arise, they are remediable.

For all of the foregoing reasons, the application is dismissed.


J.F.W. Weatherill
Chairman


Hugh R. Jamieson
Vice-Chairman


Thomas M. Eberlee
Vice-Chairman

DATED at Ottawa, this 19th day of March, 1990.

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Summary

MR. MARC LAPOINTE, COMPLAINANT, THE
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL 2309, RESPONDENT UNION, AND
CANADIAN AIRLINES INTERNATIONAL
LTD., MIS-EN-CAUSE.

Board File: 745-2297

Decision No.: 786

Résumé de Décision

M. MARC LAPOINTE, PLAIGNANT,
L'ASSOCIATION INTERNATIONALE DES
MACHINISTES ET DES TRAVAILLEURS DE
L'AÉROSPATIALE, SECTION LOCALE
2309, INTIMÉE, ET LES LIGNES
AÉRIENNES CANADIEN INTERNATIONAL
LTÉE, MISE-EN-CAUSE.

Dossier du Conseil: 745-2297

No de Décision: 786

The complainant claimed that the
International Association of
Machinists and Aerospace Workers,
Local 2309 (the union), had
violated the provisions of section
37 of the Code. The union had
refused to refer to arbitration the
collective grievance contesting the
dismissal of the complainant and
five other mechanics. According
to the complainant, the union had
breached its duty of fair
representation by making this
decision without first
investigating the matter fully and
by failing to advise him that the
grievance had been abandoned before
going to arbitration. The evidence
revealed that the union had made
its decision after having examined
an agreement between the Local
president and the employer
providing that the latter could
hire temporary personnel in this
particular case.

The complainant has not convinced
the Board that the union had
breached its duty of fair
representation. However, the Board
reminds bargaining agents that they
must provide efficient means to
ensure the quality of their
communications with the members of
their bargaining units.

This decision follows a judgment
rendered by the Federal Court of
Appeal in which decision no. 615
was referred back to the Board
(Court file A-204-87).

Le plaignant prétend que
l'Association internationale des
machinistes et des travailleurs de
l'aérospatiale, section locale
2309, a contrevenu aux dispositions
de l'article 37 du Code. Le
syndicat a refusé de renvoyer à
l'arbitrage le grief collectif
contestant le congédiement du
plaignant et celui de cinq autres
mécaniciens. Selon le plaignant,
le syndicat a manqué à son devoir
de représentation juste en prenant
cette décision sans avoir effectué
une enquête complète et en omettant
de l'aviser qu'il avait retiré le
grief avant l'arbitrage. La preuve
a révélé que le syndicat avait pris
sa décision après avoir pris
connaissance d'une entente entre
le président de la section locale
et l'employeur selon laquelle ce
dernier pouvait embaucher du
personnel temporaire dans ce cas.

Le plaignant n'a pas convaincu le
Conseil que le syndicat avait
manqué à son devoir de
représentation juste. Toutefois,
le Conseil rappelle aux agents
négociateurs qu'ils doivent prévoir
des moyens efficaces pour assurer
la qualité des communications avec
les membres de l'unité de
négociation.

Cette décision fait suite à un
jugement de la Cour d'appel
fédérale dans lequel la Cour
renvoie la décision n° 615 au
Conseil (dossier de la Cour A-204-
87).



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Reasons for decision

Mr. Marc Lapointe,

complainant,

and

International Association of
Machinists and Aerospace
Workers, Local 2309,

respondent,

Canadian Airlines
International Ltd.,

mis-en-cause.

Board File: 745-2297

The Board was composed of Ms. Louise Doyon, Vice-Chair,
and Ms. Evelyn Bourassa and Ms. Linda Parsons, Members

Appearances:

Mr. Pierre Langlois, for the complainant;

Mr. H. Lehrer, for the International Association of
Machinists and Aerospace Workers, Local 2309, accompanied
by Mr. Raymond Landry, union president - Quebec Region; and
Mr. Kevin G. Smith, Labour Relations Manager, accompanied
by Ms. Mary Hamlett, Coordinator, Personnel Administration,
Canadian Airlines International Ltd.

These reasons for decision were written by Ms. Louise Doyon,
Vice-Chair.

I

Remedy

This case deals with a complaint alleging that the
International Association of Machinists, Local 2309
(hereinafter called the respondent union), violated

section 37 of the Canada Labour Code, which reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The complainant alleges that between the time he filed a grievance against his dismissal (August 27, 1985) and the date on which he learned of the union's refusal to refer his grievance to arbitration (December 18, 1985), the union acted in an arbitrary, discriminatory manner and in bad faith.

In order to better understand why such a long period has elapsed since this proceeding was first instituted, we must review the circumstances affecting the status of this case before the Board. The complaint was filed with the Board on January 20, 1986. A Board panel held a public hearing and rendered a decision granting the March 25, 1987 complaint. The respondent union appealed this decision to the Federal Court of Appeal. In a judgment of September 29, 1988, the Federal Court of Appeal set aside this Board decision and referred the matter back to the Board in order that the complaint be reheard. On June 29, 1989, the Supreme Court denied the complainant leave to appeal from this judgment. It was in these circumstances that on August 31, 1989, a Board panel consisting of Mr. Serge Brault, Mr. Victor E. Gannon and Ms. Ginette Gosselin prepared to hear the parties.

When the hearing began, counsel for the respondent union argued, first, that a different panel, comprising members

who had not rendered the initial decision, should rehear the case and, second, that all documents pertaining to the initial hearing and decision should be removed from the file at the disposal of this new panel. That same day, the Board considered and granted these two requests. The panel consisting of the undersigned was assigned to the case and heard Mr. Lapointe's complaint on September 1 and 7 and December 7 and 8, 1989 in Montréal.

II

Evidence

1. Hiring the Complainant

In March 1985, Nordair (now Canadian Airlines International Ltd., the mis-en-cause) hired six aircraft mechanics to work in its maintenance department in Toronto. The circumstances relating to the hiring of these persons are as follows.

I. In the fall of 1984, the employer wanted to offer the aircraft mechanics in its maintenance department in Toronto the opportunity to participate in a training program involving maintenance of Boeing 737s. Groups of six employees were to undergo this training for three-week periods. The company then decided that hiring six aircraft mechanics temporarily, for 26 weeks, would allow it to replace the employees eligible for training during their absence.

II. G.D. Wright, then general manager of maintenance for Nordair, contacted the union president, Raymond Landry, to inform him that the company intended to hire temporary

personnel to replace the mechanics on training. Mr. Landry initially opposed this move and asked the employer to post the six positions to allow regular employees who wanted to do this work to try their luck. The employer posted the positions internally in the fall of 1984. No regular employees applied precisely because of the temporary nature of the work.

III. Given this situation, Mr. Wright again contacted Mr. Landry to tell him that since there had been no applicants internally, he had to go outside the company and hire temporary personnel to replace the Toronto mechanics; otherwise, the latter could not participate in the training program.

This time, Mr. Landry did not object to hiring temporary personnel for a specified period, i.e. for the duration of the training program. Mr. Landry told the Board that he said to the employer, "Do what you have to do." He stated that he had no alternative but to agree, at least implicitly, to the hiring; otherwise the company's mechanics would have been denied training that enabled them to apply for better jobs. Moreover, had he not agreed, he said, the company would have done as it saw fit and hired people without his agreement, under its management rights.

IV. Subsequently, the personnel department authorized Mr. Wright to hire six mechanics. In March 1985, three mechanics were hired in Toronto by Anthony Lloyd, then regional (Ontario) manager of maintenance, and three others were hired in Montréal, the company's headquarters, by G.D. Wright.

Marc Lapointe is an aircraft mechanic who is qualified to work on Boeing 737s. Hired on March 22, 1985 by G.D. Wright, he started work in the mis-en-cause's maintenance department in Toronto on March 26. Conflicting evidence was presented at the hearing concerning the conditions of Mr. Lapointe's hiring.

The complainant alleged in this regard that company representatives in Montréal, namely, Jean Bérubé, then chief of maintenance (Dorval), and G.D. Wright, both told him that the position was not temporary because the collective agreement made no provision for this type of employment. Mr. Lapointe's testimony on this point was unequivocal: he would not have accepted temporary employment of such short duration in Toronto because of the expense and inconvenience of moving to another city. He stated that he questioned Messrs. Bérubé and Wright concerning this matter and was certain of the answers he received.

Messrs. Bérubé and Wright, for their part, contradicted Mr. Lapointe. Mr. Bérubé maintained that he must have informed the complainant that the job was temporary because, at the time, Nordair was not hiring aircraft mechanics for permanent positions, either in Toronto or Montréal. He was very certain of his testimony in this regard for a number of reasons: he knew that the six replacement positions had been posted unsuccessfully; an agreement to hire temporary personnel existed; and the meeting with Mr. Lapointe dealt with one of these positions. For his part, Mr. Wright stated he told Mr. Lapointe that he was replacing staff in Toronto. This was the reason for the hiring and he clearly told Mr. Lapointe so at the time.

2. The Complainant's Period of Employment

The complainant worked for the mis-en-cause from March 26, 1985 to September 6, 1985. There was a lengthy presentation of evidence concerning this period. This evidence dealt essentially with the conflicting claims of the parties as to whether the complainant was a temporary or permanent employee and in particular what the complainant understood, or ought to have understood, his status to be. This evidence can essentially be summarized as follows.

I. Mr. Lapointe stated he learned at the end of April 1985 that the aircraft mechanics of Nordair's maintenance department in Toronto were taking retraining courses involving maintenance of Boeing 737s. He added, however, that it was not until August 1985 that he learned he was replacing these mechanics for the duration of their training, when he received his notice of dismissal dated August 19, 1985. This notice, signed by Mr. Anthony Lloyd, reads as follows:

"August 19th, 1985

*Mr. Marc Lapointe
Maintenance - Toronto*

Dear Marc:

This is to inform that due to the completion of the Maintenance training program in Toronto, that, in keeping with our agreement at time of your hiring, your employment with Nordair will be terminated effective September 6th, 1985.

Yours truly,

*A. Lloyd
General Manager"*

The six replacement mechanics received this notice of dismissal at the same time.

Mohan Madan and Victor Anjos, the other two mechanics hired in Montréal at the same time as Mr. Lapointe, disagreed with Mr. Lapointe as to when they learned of their temporary status.

Mr. Madan testified that Mr. Wright told him, upon hiring, that the company was retraining aircraft mechanics in Toronto and that he had to replace them temporarily. At the time, they spoke of the possibility of a permanent job, following this period of temporary employment, if Nordair's plans to expand in Toronto materialized. However, Mr. Wright did not promise him anything. There were numerous and frequent discussions regarding the status of the six new mechanics, from the moment of their hiring until August 1985. Mr. Madan personally told Mr. Lapointe toward the end of March or the beginning of April that their employment was temporary.

Mr. Anjos, for his part, testified that Mr. Wright did not tell him that their employment was temporary when he started work, nor did he ask Mr. Wright. Within hours of his arrival in Toronto, or the following day, he learned that he would occupy a temporary position. He confirmed that, as early as April, there were frequent discussions about the status of the mechanics and their lot when their period of temporary employment ended. Opinions varied, depending on the day and the person. In a May 1985 letter, Mr. Anjos asked Anthony Lloyd to clarify the company's intentions regarding whether or not his employment was permanent and the rumour that the replacement mechanics would be laid off at the end of the six-month period. Mr. Lloyd told him not to take steps to find other employment because his future

was with Nordair. Mr. Anjos did not recall whether at the time Mr. Lloyd clarified his employment status.

These two individuals sought other employment while they were in Toronto. Mr. Anjos was rehired by Nordair in September 1985, and Mr. Madan in January 1986. They were not credited with any seniority for the period from March to September 1985.

Mr. Lapointe confirmed that frequent discussions occurred regarding the employment status of the six mechanics during this period. He personally discussed the matter with, among other persons, George Manikis, vice-president of the local of the respondent and union representative in Toronto, after Mr. Madan told him that their employment was temporary. Mr. Manakis told him, as he consistently maintained throughout this period, that the collective agreement did not provide for temporary employment in the aircraft mechanic classification. A little later, Mr. Manikis gave him a copy of the collective agreement, told him to read it to put his mind at ease and to stop questioning him about this matter. In May 1985, Mr. Lapointe telephoned Mr. Lloyd to discuss his employment status. Mr. Lloyd told him that there was no question, for the time being, of any lay-off and not to worry for a number of reasons, one being his good appraisal report. Mr. Lloyd did not tell him at the time that his employment was temporary.

Anthony Lloyd, who had replaced Mr. Wright in Montréal in April 1985, testified, for his part, that there were frequent discussions about the status of the six mechanics during this period. According to him, each time he was questioned on the subject, he answered that if there was

work available after the period in question, these persons could be considered for employment. According to him, Mr. Lapointe knew, or ought to have known, that his employment was temporary, given the content and frequency of the discussions on the matter.

Besides the discussion about the status and possible fate of the employees in question, two other events occurred during this period. First, their names appeared on the seniority list and, second, they received a performance appraisal, in April and in July, as if they were probationary employees. His name on the seniority list strongly reassured Mr. Lapointe regarding his employment status. According to Mr. Lloyd, the seniority list was a document used for administrative purposes, such as awarding overtime, which is based on seniority, and has no other significance.

On the whole, the evidence relating to this period revealed that there were frequent discussions and exchanges concerning the employment status of these persons and that opinions differed.

3. The Respondent Union's Conduct

The circumstances in which Raymond Landry agreed, in the fall of 1984, to hire temporary aircraft mechanics are known. His interest in seeing aircraft mechanics who belonged to his union receive this training was the reason for this decision. And in this regard, he said, he acted properly. Mr. Landry did not perform his union duties between March and August 1985.

The vice-president of the respondent union, George Manikis, who acted as union representative, is himself an aircraft mechanic. During the period in question, he worked with the new mechanics on different shifts. In fact, it was in his capacity as union representative that he met with these new employees upon their arrival in Toronto. He knew that they were replacing the aircraft mechanics who were taking part in the training program.

These persons were very quickly made aware that their employment was temporary. This situation surprised him because the collective agreement made no provision for this employment status for the aircraft mechanic classification. He was not aware at that point of the agreement concluded between Mr. Landry and the employer. He learned of this from Mr. Landry during a telephone conversation between the first and second steps of the grievance procedure. Like the other witnesses, he testified that there were numerous discussions and exchanges regarding the status and duration of employment of these mechanics. He discussed this matter on a number of occasions with all these persons and in particular with the complainant who questioned him regularly. According to Mr. Manikis, Mr. Lapointe never told him, during this period, that he had not been hired on a temporary basis. The witness, for his part, always maintained that the company could not employ aircraft mechanics temporarily, since the collective agreement made no provision for this employment status. At the time, he considered that these employees were regular employees on probation.

After the employees received the notice of dismissal of August 19, 1985, Mr. Manikis decided to file a collective

grievance to contest the company's decision. This grievance, dated August 27, 1985, reads as follows:

"[explanation of grievance]

We have been unjustly disciplined by way of discharge (termination of employment) re: letter of termination dated August 19, 1985.

...

[We are seeking] reinstatement with all our rights and privileges and full compensation for all time lost at straight time rate."

He explained the situation to the employees concerned. They all signed this grievance, with the exception of Mohan Madan, who saw no point to it, given the temporary nature of their employment. Mr. Manikis admitted that he was aware, at this time, that there would be no work in Toronto for these six individuals, once the training program ended. According to his testimony, he explained the situation to those who signed the grievance and stated his intention to try and obtain, at the very least, recall rights for these employees. The evidence on this issue is contradictory. Mr. Lapointe denied that Mr. Manikis formulated the grievance in these terms, while Mr. Anjos had little recollection of whether the grievance dealt solely with recall rights. However, the complaint that Mr. Lapointe filed with the Board on January 20, 1986 states, inter alia, the following:

"The Union (lodge 2309) advised me to submit a collective grievance to defend my recall rights."

(translation)

Mr. Manikis submitted the grievance at the first step of the procedure, putting forward, he said, all arguments he considered appropriate in the circumstances. The employer dismissed the grievance on September 12, 1985. In

accordance with internal procedure, Mr. Manikis then forwarded the grievance to Gilles Leduc, the union official responsible for grievances in Montréal. At that point, between the first and second steps of the grievance procedure, Mr. Manikis received a telephone call from Mr. Landry who told him of the agreement reached in the fall of 1984 concerning hiring temporary staff.

Mr. Manikis attended the meeting at the second step with the employer in Montréal, which he normally does not do. He continued to press his argument that these employees should be granted recall rights, failing their immediate reinstatement. The employer dismissed the grievance at the second step.

The executive committee decided not to refer the grievance to arbitration at its monthly meeting in October 1985. Gilles Leduc recommended that the union not proceed to arbitration with the grievance since the chances of success were slim, particularly in view of the agreement reached between the employer and Mr. Landry in the fall of 1984. The executive committee acted on his recommendation. Mr. Manikis did not attend this meeting because he was on sick leave.

In accordance with internal procedure, the union's recording secretary must notify in writing persons affected of decisions that concern them. In October 1985, the incumbent of this position had resigned. According to Mr. Landry, this explained why neither Mr. Lapointe nor the other four employees were informed in writing of this decision, contrary to standard procedure.

The evidence also revealed that Mr. Landry never discussed, or submitted for approval by the executive committee or any other union jurisdiction, the agreement reached in the fall of 1984. Mr. Manikis testified that had he been aware of this agreement, he would never have filed the collective grievance.

The union never communicated with Mr. Lapointe after the grievance was filed. The complainant testified that he spoke to Raymond Landry at Dorval in September 1985. Mr. Landry told him that he was unaware that a collective grievance had been filed in Toronto and suggested that he contact Gilles Leduc. He did so that very day. Mr. Leduc told him that the grievance had been dismissed at the first step, that it would soon proceed to the second step, and that he would have news for him concerning the grievance later. When no news was forthcoming, Mr. Lapointe tried in October and November 1985 to contact union representatives, to be finally informed by Albert Brouillette on December 18, 1985 that the union had decided not to refer the grievance to arbitration because it felt it had no chance of succeeding. At the time, Mr. Brouillette was attending meetings of the executive committee in his capacity as union official responsible for occupational safety and health, and this was how he learned of the fate that the grievance was to meet.

III

The Parties' Positions

1. The Complainant's Position

I. The complainant submits first that the verbal agreement reached in the fall of 1984 between Raymond Landry and G.D. Wright is illegal and cannot validly bind him. According to him, the collective agreement prohibited hiring aircraft mechanics on a temporary basis for a specified period, and such an agreement could not validly apply in the circumstances and under the conditions of this case.

Mr. Lapointe further submits that the employer did not tell him, when he was hired, that he was replacing for a specified period regular employees. For this reason, he claims, first, that if the agreement in question is valid, it cannot apply to him, and second, that he is covered by the provisions of the collective agreement. Consequently, when his employment ended, he was a regular employee on probation who had the right to grieve under the collective agreement.

Article 7.01 of the collective agreement stipulates the following:

"An employee working through his probationary period will be considered as coming within the scope of this Agreement, with the understanding that the Company has full rights to discharge probationary employees, if, in the opinion of the Company, they do not meet the standards required of them by the Company."

II. Second, Mr. Lapointe alleges that the union unlawfully refused to refer to arbitration the grievance contesting his

dismissal and failed to conduct an investigation, communicate with him, and keep him informed at the various steps of the procedure. In particular, he accuses the respondent union of not communicating to him in due course and in the appropriate manner the decision not to refer the grievance to arbitration.

2. The Respondent Union's Position

I. In reply to the complainant's first argument, the union submits that the verbal agreement between the Local president and the employer concerning hiring aircraft mechanics as replacement employees, for a specified period, is legal. As part of the routine administration of the collective agreement, Mr. Landry agreed to dispense temporarily and for a limited period with the application of certain provisions of the collective agreement in order to allow some of his members to participate in a training program. The union acted in the interests of its members in order to improve their working conditions because, without the replacement mechanics, no Toronto employee could have received this training.

II. In reply to the complainant's second argument, the respondent union submits that it decided not to refer the grievance to arbitration after a careful examination of all relevant facts. The union filed a grievance, proceeded with it through all steps of the established procedure and finally abandoned it after determining, in the light of the agreement reached, that it had no chance of succeeding. The union further submits that it made a serious attempt to obtain recall rights for the employees in question, but to no avail. Moreover, the union vice-president was involved

in all steps of the grievance procedure, an exceptional initiative that strengthened the union's argument that it made every reasonable effort. Finally, the union acknowledges that communication with the complainant, after the grievance was filed, may have left something to be desired, but that this one failing alone does not in this case constitute a breach of its duty of fair representation.

IV

Case Law

The role of the Board, when dealing with a complaint under section 37 of the Code (see text at page 2), is to examine the conduct of the union and its representatives to determine whether the conduct is arbitrary or discriminatory or whether the union displayed bad faith in representing employees of the bargaining unit. Past Board decisions dealing with the question, as well as those of administrative tribunals, have established that this examination must focus on the manner in which the union conducted itself and avoid the Board's substituting its opinion for that of the union as to the merits of the grievance and the appropriateness of referring it to arbitration.

In Jacques Poitras (1986), 63 di 183 (CLRB no. 546), the Board had this to say:

"Section 136.1 [37] is limited in scope. Its purpose is not to penalize the want of generosity on the part of unions, their officers and their representatives. Nor is it its purpose, except insofar as follows, to impose penalties related to the quality of union representation as a whole. In fact, the sole aim of section 136.1 [37] is to prevent excesses. To use a well-known analogy, Parliament did not intend the Board to become 'Better Union Bureau' or, in French, a 'Bureau

d'éthique syndicale,' responsible for monitoring all union practices according to rules comparable to consumer protection.

The Board must avoid substituting itself for the employees or their unions in the conduct of their affairs. With the parameters of the Code, which confers on the union a wide margin of discretion, it is important to guard against a paternalistic approach which would justify intervention in matters that concern only the employees ..."

(page 190)

Later, in Lionel Arsenault (1988), as yet unreported CLRB decision 692, the Board said the following:

*"As the Board held in numerous cases (Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); Jacqueline Brideau, *supra*; Robert Lacoste and Marcel Leduc (1988), 73 di 160; and 89 CLLC 16,001 (CLRB no. 680)), it must focus principally on the attitude and behaviour of the union and its officers in examining, analysing and processing a grievance. The union remains the body legally responsible for all the employees in a bargaining unit. It must act honestly, with an acute sense of responsibility, being careful not to display an attitude that is in bad faith, arbitrary or discriminatory. This is how the duty of fair representation is defined."*

(page 6)

The Board went on to add the following:

"In fact, the Board has repeatedly stated its belief that, during the presentation of evidence relating to section 136.1 [37] complaints, it would not go into the details of the facts and circumstances that gave rise to the grievance. It thus refused to embark on an examination of the substance and merits of the grievances, except to determine the setting, background and atmosphere as well as the circumstances that gave rise to the complaint. As the Board often has to repeat, the only aspect of interest is the union's conduct and attitude in studying, analysing and processing the grievance. ..."

(page 8)

These two decisions illustrate the limits of Board intervention and the approach it adopts when dealing with complaints alleging a breach by a union of its duty of fair representation. As far back as 1980, in Kenneth Cameron (1980), 42 di 193; and [1981] 1 Can LRBR 273 (CLRB no. 282), the Board had adopted a similar attitude:

"On the one hand, it must be kept in mind that the union is the bargaining agent, and as such, has an exclusive bargaining authority pursuant to section 136(1) [36(1)] of the Code. On the other hand, its authority must be exercised fairly and without discrimination in the representation of employees.

Therefore, it must be recognized that in the processing of a grievance and its control, a union has the exclusive right to make a decision at any step of the procedure, be it to proceed with the grievance, to settle it or to abandon it, and the Board should not interfere in this respect. The rationale is analyzed in Rayonnier Canada (B.C.) Ltd., [1975] 2 Can LRBR 196 (B.C.L.R.B.), and Frederick Carl Vincent, [1979] 2 Can LRBR 139 (O.L.R.B.); and [1979] OLRB Feb. Rep. 144.

However, its conduct can be subject to scrutiny under the duty of fair representation. ..."

(pages 202; and 280)

In short, when the Board deals with such allegations, its role is not to pass judgement on the bargaining agent's decision, i.e. to substitute its assessment for that of the union, but rather to determine whether, in representing the employees in the bargaining unit, the union acted in accordance with the Code and the case law. The Supreme Court judgment in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, defined the parameters of fair representation, and it is appropriate to recall them:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining*

unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 527)

It is therefore in the light of these guidelines that the Board intends to examine the conduct of the respondent union in the instant case.

V

Decision

The respondent union did not violate section 37 of the Code. The Board believes that the respondent union's conduct and actions provide no evidence that it acted in a manner that was arbitrary, discriminatory or in bad faith in representing the complainant. The Board notes that there could have been better communication with the complainant after the grievance was filed. However, this aspect is not sufficient in the instant case to constitute a violation of section 37 of the Code.

The Agreement Between Mr. Landry and the Employer

The Board examined whether the consenting, at least implicitly, by Mr. Landry, the president of the respondent union, to hiring aircraft mechanics temporarily as replacements in Toronto constitutes in the instant case a violation of section 37 of the Code. It is not up to the Board, need we repeat, to decide the legality or illegality of Mr. Landry's action, but rather to determine whether this action, when viewed in its context, constituted a breach by the union of its obligations to the members of the bargaining unit. The circumstances in which this agreement was made and the reasons that led Mr. Landry to agree as a last resort to this arrangement provide no evidence of conduct that is contrary to section 37. The fact that Mr. Landry alone made this decision, without informing his union colleagues, certainly created confusion and needlessly complicated the situation, but it does not constitute in itself a violation of section 37 of the Code.

The Union Representative's Conduct

Secondly, the Board focused on the role played by the union vice-president, George Manikis, during this period. The Board is satisfied that, at the time, he fulfilled his role of union representative in accordance with the requirements of the Code in the circumstances. During the period in question, when informed by certain mechanics of their temporary employment status, he decided, believing his interpretation of the collective agreement to be correct, to let the situation evolve and react in due course. This is what he did when, in August 1985, the employees concerned received the notices of dismissal. He intervened by filing

a grievance, the appropriate course of action in the circumstances. Mr. Manikis knew the job situation in Toronto and he therefore explained that he would at least try and find another solution, namely, obtain recall rights for the affected employees, failing their immediate reinstatement. The complainant failed in this regard to persuade the Board that Mr. Manikis had not informed the employees of how he intended to proceed.

The grievance procedure was followed and Mr. Manikis intervened at the second step of this procedure, which was an unusual initiative. Upon learning of the agreement reached in the fall of 1984, he maintained his position in order to obtain another benefit for the employees, knowing that the employer had dismissed the grievance at the first step. He did not succeed. Based on the evidence heard, Mr. Manakis' conduct appears to meet the requirements of section 37 of the Board.

The fact that Mr. Manikis was unaware of the agreement between Mr. Landry and the employer cannot be held against him and does not weigh against him in the assessment of his conduct. Moreover, the remarks he made when he was not aware of the new situation created by this agreement cannot confer a right on the employees.

Hiring the Complainant

The Board examined one of the complainant's main arguments. They can be summarized as follows. Since the employer did not inform him that his employment was temporary when it hired him, the agreement between Mr. Landry and the employer does not apply to him. He was therefore a regular employee

on probation when his employment ended on September 6, 1985, the only employment status provided for in the collective agreement. Since his performance appraisal reports were very positive, the chances of his grievance succeeding were excellent and the union should have referred it to arbitration. According to the complainant, the union breached its duty of fair representation by abandoning his grievance, without conducting an investigation or consulting him before withdrawing his grievance.

The Board received and examined detailed evidence concerning the complainant's status and employment. It did so solely to assess the union's conduct in order to determine whether it met the criteria established by the Code and the case law. It is not up to the Board to decide the complainant's status or employment status because this aspect of the case involves the question of whether or not the grievance has merit. In this regard, the Board refers to what it said in Lionel Arsenault, supra.

An examination of this part of the evidence reveals major contradictions regarding the terms and conditions of Mr. Lapointe's hiring. These contradictions are evident in the testimony given by Messrs. Lapointe, Wright and Bérubé. Moreover, the evidence describing the atmosphere that prevailed during the period when the six mechanics were employed does not clarify these contradictions.

The complainant submits that the union failed to investigate adequately all aspects of this situation before making a decision. The evidence reveals that Messrs. Manikis and Lapointe were in close and constant contact between March and August 1985. They frequently discussed this question

in detail, together and with other employees. The union was aware of Mr. Lapointe's situation when it decided not to refer the grievance to arbitration. In this regard, the complainant did not persuade the Board that the union acted without knowledge of the situation. Mr. Lapointe disagrees with the union's decision. That is his right. However, it is not up to the Board to decide whether, in fact, this was a good or a bad decision. The Board can only determine whether the union acted without proper judgement and negligently, thereby violating section 37 of the Code. In this case, the Board does not believe that it did.

The union also tried to obtain another benefit for the employees in question, i.e. recall rights. This is another factor to be taken into account in assessing a union's conduct. (See in this regard Manual Silva Filipe (1982), 52 di 20; and 2 CLRBR (NS) 84; Jacques Poitras, supra; Lionel Arsenault, supra; and Clarence R. Young (1989), as yet unreported CLRB decision no. 753.)

Finally, the respondent followed its internal rules for processing grievances, and the executive committee made the decision not to proceed to arbitration with the grievance in accordance with standard procedure. In Jacques Poitras, supra, the Board said the following:

"The union made its decision in its usual manner, and it was communicated to the complainant. In short, there is no indication on file that the union's action was arbitrary, discriminatory or hostile. ..."

(page 192)

The complainant alleges that the respondent union did not inform him properly and quickly of the decision not to refer the grievance to arbitration. This allegation has merit.

Mr. Lapointe had to take initiatives in order to learn of the final disposition of his grievance, and he finally learned of its fate in circumstances that do not reflect very well on the union.

The union admits that it did not follow the normal communication procedure and that it should have informed Mr. Lapointe of the decision differently and more quickly. This situation caused the complainant concern and inconvenience. However, the Board does not believe that, in this case, that conduct constitutes a violation of section 37 of the Code.

In conclusion, however, the Board wishes to comment on the general question of the dissemination of information and communication between bargaining agents and employees in the bargaining unit. This issue is very important, as is attested to by the amount of case law on the subject. The Board has generally taken a cautious approach to the subject of union communication with the members of a bargaining unit. It has clearly had good reason to do so, given the nature of the powers it exercises under section 37 of the Code. However, bargaining agents must be mindful of this fundamental and essential aspect of their relations with the employees in the bargaining unit. Unions must be aware that if communication is insufficient or unsatisfactory, this can and may constitute a violation of section 37 of the Code. In Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), a case dealing with the degree of communication that a bargaining agent must maintain when preparing a grievance file, the Board said this:

"Thus, there is no obligation to communicate with the grievor, but if the lack of communication

results in a situation which prejudices the position of the grievor, then that omission can result in a violation of section 136.1 [37]."

(pages 240; 270; and 14,109)

This statement is correct and the obligation and responsibility to put it into practice rests solely with the bargaining agents. Manual Silva Filipe, supra, clearly illustrates this point. In that case, the Board had before it a section 37 complaint, the circumstances of which are comparable with those of the instant case. The union, when informed of the employer's wish to dismiss an employee before the end of his probationary period, agreed to an extension of this period. Neither the union nor the employer informed the employee of this decision. The employee received a notice of dismissal subsequent to the expiry of the probationary period provided for in the collective agreement, but before the additional period expired. He filed a grievance contesting his dismissal. When the union refused to refer the grievance to arbitration, he filed a section 37 complaint on the strength of the agreement extending the probationary period. The Board dismissed this complaint, which it found to be unfounded. However, the Board examined in great detail the consequences of a lack of communication between the parties, including the employer, on an employment relationship whose terms and conditions are governed by a collective agreement. It is appropriate to cite the following excerpt from that decision, in view of its relevance to the present case:

"Having given close attention to the representations of both parties, both in evidence and arguments, the Board is impressed that this is a labour relations dispute that need not and should not have come before the Board. Communication failure is a serious handicap in labour relations, and is all too often responsible in disputes which occur between the principal protagonists, labour unions and managements and should not be imported into labour disputes

involving now three protagonists, such as 136.1 [37], the additional one being a member of a bargaining unit. Much needless misunderstanding has been the basis of antagonism and contestation simply because parties who have a fundamental need to maintain clear and unclouded communication fail to do so.

In the circumstances of this case there has been no failure to comply with the provisions of section 136.1 [37] of the Code. There has, though, been a failure to communicate.

...

Secondly, the System General Chairman has an obligation to his position, in the opinion of this Board, to maintain his communication within the jurisdiction of his office at least at the level where an employee who is not succeeding during probation is made aware of that fact; and very much more so when the employee's future employment is in jeopardy. The internal procedures which the union may employ to achieve the desired result are a matter of the union to decide upon. ... In this case, it is apparent, communication did not occur. The result is that the complainant, unaware of the extended probationary period in which his union had concurred, grieved the employer's actions which had been taken under the provisions of the extended probation. Since the union had formally concurred in the extended probation, it is self-evident that it could not, during the period of the extension, conduct itself as though the extension did not exist, or was not authorized.

Given these circumstances, the complaint under section 136.1 [37] is dismissed. There was demonstrated no malice on the part of the union, no bad faith, no arbitrariness, discrimination or negligence. The complainant was accorded the same consideration in his troubled situation as had been accorded previous probationary failures. That the internal communication between the union and the local, as well as the employee concerned, resulted in misunderstanding and conflict is regrettable. It is, however, not a failure of the union's duty of fair representation."

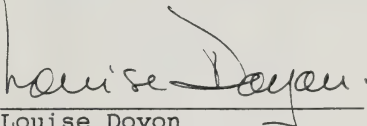
(pages 24-25; and 89-90)

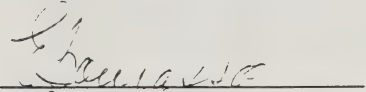
In the light of these comments, we can categorically conclude that had the respondent union shown more care and diligence in the instant case, it would have put the initial agreement in writing and made sure to inform all persons who might be affected by the existence and application of this agreement. Had this happened, the dispute that the Board

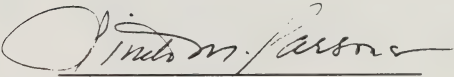
is today settling, after several years, would never have arisen. The union did not contravene the Code, but this is not to say that its conduct was exemplary.

For these reasons, the complaint is dismissed.

This decision is unanimous.


Louise Doyon
Vice-Chair


Evelyn Bourassa
Members of the Board


Linda Parsons
Member of the Board

ISSUED at Ottawa, this 3rd day of April 1990.

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Summary

DAVID SHOEMAKER, COMPLAINANT, JOINT
PROTECTIVE BOARD OF THE BROTHERHOOD
OF RAILWAY CARMEN OF CANADA,
RESPONDENT, AND CANADIAN NATIONAL
RAILWAY COMPANY, EMPLOYER.

Board File: 745-3368

Decision No.: 787

Résumé de Décision

DAVID SHOEMAKER, PLAIGNANT, LA
FRATERNITE DES WAGONNIERS DE CHEMINS
DE FER DU CANADA, INTIMÉE, ET LA
COMPAGNIE DES CHEMINS DE FER
NATIONAUX DU CANADA, EMPLOYEUR.

Dossier du Conseil: 745-3368

N° de Décision: 787

In this complaint, Mr. David
Shoemaker alleges that his union
failed to represent him in a manner
that was not arbitrary,
discriminatory or in bad faith by
refusing to forward his grievance to
arbitration.

In their analysis of this Section 37
complaint, the Board determined that
it would be unnecessary to hold a
hearing and so exercised its
discretion in accordance with
section 98 (2) of the Code.

The evidence was more than
compelling and not disputed that the
union had handled the grievance in
an exemplary manner and chose not to
go to arbitration only after the
normal Executive Meeting had
assessed and determined the merits
of the grievance.

The Board reviewed its jurisprudence
concerning interference with the
union's right to determine
themselves the possibility of
success at arbitration.

In the case at hand, the Board felt
the union had done an impeccable job
for Mr. Shoemaker and chose not to
interfere with their decision not to
proceed to arbitration as normal
practice was followed in making
their decision and there was not a
shred of evidence produced which
could lead this Board to determine
that the complainant had been
unfairly represented by his union.

M. David Shoemaker allègue dans sa
plainte que son syndicat l'a
représenté de façon arbitraire et
discriminatoire et a agi de mauvaise
foi lorsque celui-ci a refusé de
porter son grief à l'arbitrage.

A la suite de son analyse de la
plainte déposée en vertu de
l'article 37, le Conseil a jugé
qu'il n'y avait pas lieu de tenir
une audience publique et a donc
exercé son pouvoir discrétionnaire
en conformité avec le paragraphe
98(2) du Code.

Les éléments de preuve très solides
et non contestés révèlent que le
syndicat a traité le grief de façon
exemplaire et a décidé de ne pas
recourir à l'arbitrage seulement
après que les membres du comité
exécutif eurent examiné et jugé le
bien-fondé du grief.

Le Conseil a passé en revue ses
décisions antérieures concernant le
droit des syndicats de décider eux-
mêmes des chances de succès à
l'arbitrage.

En l'espèce, le Conseil juge que le
syndicat a agi de façon
irréprochable à l'endroit de
M. Shoemaker et décide donc de ne
pas se mêler de la décision du
syndicat de ne pas porter le grief
à l'arbitrage, parce que celui-ci
avait pris sa décision en suivant le
cheminement habituel. En outre,
aucun élément de preuve n'a été
produit qui aurait pu inciter le
Conseil à juger que le plaignant
n'avait pas été représenté de façon
juste par son syndicat.



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Reasons for decision

David Shoemaker,
complainant,
and

Joint Protective Board of the
Brotherhood of Railway Carmen
of Canada,

respondent,
and

Canadian National Railway Company,
employer.

Board File: 745-3368

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Members François Bastien and Linda M. Parsons.

These reasons for decision were written by Linda M. Parsons.

I

On March 15, 1990, a panel of the above met in Ottawa to
consider a complaint filed on September 18, 1989, by
Mr. David Shoemaker (the complainant) wherein he alleges
that the Brotherhood of Railway Carmen of Canada (the union
or the BRCC) breached its obligations under section 37 of
the Canada Labour Code (Part I - Industrial Relations) by
refusing to advance his grievance to arbitration. Section
37 of the Code reads as follows:

"37. A trade union or representative of a trade
union that is the bargaining agent for a bargain-
ing unit shall not act in a manner that is
arbitrary, discriminatory or in bad faith in the
representation of any of the employees in the unit
with respect to their rights under the collective
agreement that is applicable to them."

II

The events giving rise to the present complaint began on July 2, 1987 when Mr. Shoemaker, working as a carman helper, was assessed 15 demerit points by the Canadian National Railway (CNR or the employer):

"For your failure to act in a safe manner during your switching operations during your tour of duty on June 5, 1987, which resulted in a car being moved without a proper and clear signal from your groundman who was injured as a result."

This assessment resulted in a total record discipline of 45 demerits.

As a result of the June 5 incident, the employer conducted the usual investigation in line with the wage agreement at which BRCC Local Chairman J.F. Burns attended. On July 6 Mr. Burns met with CN Rail car foreman, Mr. R. Wonnek, in an effort to resolve the discipline assessed but was unsuccessful. An official grievance was lodged by the union on July 22, 1987 on behalf of Mr. Shoemaker requesting that the discipline be rescinded.

With the denial of Step I by the employer, the union continued to process the grievance through to Step IV, which was also declined:

"July 25, 1989

*Mr. T. Wood
System General Chairman
Brotherhood Railway Carmen of Canada
1729 Bank Street
Suite 307
Ottawa, Ontario
K1V 7Z5*

Dear Mr. Wood:

This is further to our letter of February 1, 1989, concerning a grievance submitted on behalf of Carman Helper D. Shoemaker, P.I.N. 819236, of Thornton Yard, Vancouver, B.C.

Carman Helper Shoemaker's record was assessed 15 demerits effective June 5, 1987, for:

'Your failure to act in a safe manner during your switching operations during your tour of duty on June 5, 1987, which resulted in a car being moved without a proper and clear signal from your groundman who was injured as a result.'

In the interest of resolving this dispute, and without prejudice to either party's position, the Company is prepared to offer full and final settlement of the grievance on the basis that a revised CN Form 780 be issued assessing 15 demerits to Carman Helper Shoemaker's record effective June 5, 1987, to read as follows:

'For your failure to act in a safe manner during your switching operations during your tour of duty on June 5, 1987, which resulted in a car being moved without a proper and clear signal from your groundman.'

If you agree that the foregoing constitutes full and final settlement of the dispute, please so indicate by signing the second copy of this letter and returning it to our office.

Yours truly,

I CONCUR:

*(signature)
for Assistant Vice-
President
Labour Relations*

*(signature)
System General Chairman
Brotherhood Railway
Carmen of Canada"*

Mr. Shoemaker then wrote to Mr. T. Wood, Union System Chairman on March 9, 1989 requesting that his grievance be processed to arbitration. Mr. Wood complied and immediately registered the grievance for arbitration in order to protect the time limits.

Mr. Wood had at the same time a number of other grievances pending arbitration and felt it would be advantageous to have the merits of each case assessed by the Joint Protective Board and the Executive Council Members. Each member from various locations across Canada received complete dossiers on each case prior to attending a meeting scheduled

in Ottawa for June 4 to 9, 1989. Mr. Shoemaker's grievance was dealt with at this time. Having studied the discipline assessed Mr. Shoemaker in previous incidents, the seriousness of the offence charged and the jurisprudence covering accidents, the Executive Board determined that the 15 demerits assessed were within allowable limits. Mr. Wood was instructed by the Executive to withdraw the grievance from arbitration.

Mr. Shoemaker was advised of the union's decision in a letter dated June 19, 1989. At the same time, Local Chairman Burns contacted Mr. Wood by phone to discuss Mr. Shoemaker's discipline assessment, known as a 780 Form. He had concerns that future problems could arise because of the reference to "injury" in the discipline assessment. They both felt that should Mr. Shoemaker receive future discipline, such language on his file could be damaging. Mr. Wood proceeded to contact the employer who agreed to remove the language as a full and final settlement of the grievance.

III

The Board in its consideration of this complaint determined that a hearing would not be consistent with the objectives of Part I of the Code and that the complaint could be decided without such a hearing, in accordance with section 98(2) of the Code:

"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."

In Gordon Duncan McCance (1985), 61 di 49; 85 CLLC 16,042; and 10 CLRBR (NS) 23 (CLRB no. 515), the Board dealt with

the criteria as to when no public hearing will be held. The Board said:

"... What we will be looking for initially are complaints that are obviously untimely under section 187(2), or cases where, after consideration of all of the information before it, the Board is satisfied that even if what is alleged is true, the circumstances would not amount to a breach of the trade union's duty of fair representation."

(pages 63; 39; and 14,284)

It was more than obvious to the Board that in this particular case Mr. Shoemaker could not have asked for any better in terms of union representation in the handling of his grievance. From the first notice of the investigation interview, the union was there to assist. Each step of the grievance procedure was complied with and we might add not in just a perfunctory manner. Lengthy letters were exchanged with the employer and numerous phone calls made in an effort to settle the matter in Mr. Shoemaker's favour.

We acknowledge that Mr. Shoemaker is not complaining of the handling of his grievance but that he does take issue with the union's refusal to go to arbitration. Extensive jurisprudence on a union's duty of fair representation has been developed by this Board since the introduction in 1978 of section 136.1 (new section 37) to Part V (new Part I) of the Canada Labour Code. Many of the Board's decisions have granted considerable latitude to unions in their decision as to whether or not continue a grievance to arbitration.

Following a review of Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; and (1984), 84 CLLC 14,043, the Supreme Court of Canada endorsed the Board's principles and established the following criteria which they felt should be strictly adhered to by a union in its handling of grievances:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. The discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; and 12,188; emphasis added)

Decisions of the Board on point were cited in the Court's decision: Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304).

In Gordon Duncan McCance, supra, the Board again addressed the bargaining agent's discretion:

"The broad discretion possessed by a bargaining agent not to proceed with a grievance, that the Supreme Court of Canada has now recognized, has been at the root of the majority of the complaints to this Board under section 136.1. People either did not understand or were just not willing to accept that a bargaining agent can abandon a grievance without their consent. Regardless of the times the Board said publicly that it is not an appeal body from decisions taken in good faith by trade unions not to advance a grievance, complaints continued to come forward founded upon

a conviction that the trade union had no right to make that decision."

(pages 61; 36; and 14,283)

And further in that decision:

"To facilitate free and meaningful collective bargaining, trade unions representing employees in bargaining units are given a wide discretion in how they represent the collectivity. As we have shown, absent arbitrariness, discrimination and bad faith, bargaining agents need not take all grievances to an arbitrated conclusion. Apart from the much discussed adverse effects on labour relations, a major consideration indicating the need for that discretion is the enormous cost to both parties of both financial and other resources if all disputes were arbitrated."

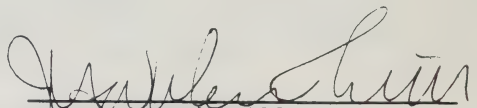
Gordon Duncan McCance, supra

(pages 62; 38; and 14,283)

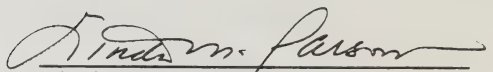
In the case before us, we are of the opinion that we are unable to find any reason to uphold the complaint of Mr. Shoemaker. The union discussed the grievance at great length with the Executive Committee and determined that given the complainant's previous record the assessment of demerits for the misdemeanour was not unreasonable and certainly within the established guidelines used by the union in such cases. It was their decision that the case was not arbitrable and therefore unwinnable.

The complainant should stop in this case and step into the union's shoes for a better understanding of the burden placed on a union's shoulders in handling grievances. The BRCC has helped Mr. Shoemaker through the years with his grievances just as they have for the rest of their membership. In taking a decision concerning the processing of grievances to arbitration, unions must also use their past experiences at arbitration to determine the possibility of success. Arbitration is a costly venture, established within the labour relations structure as a final means to resolve a dispute. Unions have a duty to their membership

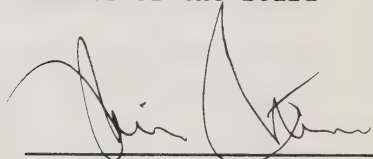
to use this mechanism with the respect it deserves. This means that stringent control must be maintained in monitoring arbitrability of cases and grievances should not be allowed to end up in front of an arbitrator on a whim or a prayer. As long as bargaining agents continue to reach decisions not to proceed to arbitration in a manner that is fair and equitable, the Canada Labour Relations Board will not try to second-guess their decision by insisting on arbitration. Mr. Shoemaker's union has not violated section 37 of the Code. The complaint is therefore dismissed.



J.F.W. Weatherill
Chairman



Linda M. Parsons
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 4th day of April 1990

information

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Summary

CANADIAN MERCHANT SERVICE GUILD,
APPLICANT, SEA-LINK MARINE SERVICES
LTD., EMPLOYER, AND CANADIAN
BROTHERHOOD OF RAILWAY, TRANSPORT
AND GENERAL WORKERS, LOCAL 400,
INTERVENOR.

Board File: 530-1681

Decision No.: 788

Doubts were raised about which
jurisdiction - federal or
provincial - has the authority to
regulate the industrial relations
of Sea-Link Marine Services Ltd.
(Sea-Link), in respect of its
operation of a truck ferry for CP
Rail between Vancouver harbour and
Swartz Bay on Vancouver Island.

The Board concluded that this
operation of Sea-Link is
functionally integrated into the
federal undertaking, CP Rail, and
is a vital, essential and integral
part of the latter's business.
Thus, Sea-Link is under federal
authority for industrial relations
purposes.

Ce document n'est pas officiel.
Les motifs de décision seulement
peuvent être utilisés aux fins
légales.

Résumé de Décision

LA GUILDE DE LA MARINE MARCHANDE DU
CANADA, REQUÉRANTE, SEA-LINK MARINE
SERVICES LTD., EMPLOYEUR, ET LA
FRATERNITÉ CANADIENNE DES
CHEMINOTS, EMPLOYÉS DES TRANSPORTS
ET AUTRES OUVRIERS, SECTION LOCALE
400, INTERVENANTE.

Dossier du Conseil: 530-1681

No de Décision: 788

Des doutes ont été formulés quant
à savoir quelle compétence,
fédérale ou provinciale, avait le
pouvoir de réglementer les
relations de travail de Sea-Link
Marine Services Ltd. (Sea-Link) à
l'égard de l'exploitation d'un
transbordeur de camions pour CP
Rail entre le port de Vancouver et
Swartz Bay sur l'île de Vancouver.

Le Conseil a jugé que cette partie
de l'entreprise de Sea-Link est
intégrée sur le plan fonctionnel à
l'entreprise fédérale de CP Rail et
qu'elle constitue donc une partie
vitale et essentielle de
l'entreprise de cette dernière et
en fait partie intégrante. Par
conséquent, Sea-Link est du ressort
fédéral aux fins des relations de
travail.



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Merchant Service Guild,
applicant,
and
Sea-Link Marine Services Ltd.,
employer,
and
Canadian Brotherhood of Railway,
Transport and General Workers,
Local 400,
intervenor.

Board File: 530-1681

The Board consisted of Thomas M. Eberlee, Vice-Chairman,
and James D. Abson and Linda M. Parsons, Members.

Appearances:

Robert B. Blasina, for the Canadian Merchant Service Guild;
Adriana F. Wills, for Sea-Link Marine Services Ltd.; and
Bruce Laughton, for the Canadian Brotherhood of Railway,
Transport and General Workers, Local 400.

These reasons for decision were written by Vice-Chairman
Eberlee.

I

The issue addressed in these reasons for decision is whether
Sea-Link Marine Services Ltd. (hereinafter referred to as
Sea-Link or the employer) is a federal work, undertaking or
business and thus whether the Canada Labour Relations Board
has the constitutional jurisdiction to apply the provisions
of the Canada Labour Code in respect of Sea-Link's relations
with its employees.

Believing at the time that the Board does have such jurisdiction, the same quorum of the Board (Eberlee/Abson/Parsons), in September 1988, issued an order certifying the Canadian Merchant Service Guild (hereinafter called the CMSG) as the bargaining agent for a unit of licensed personnel employed by Sea-Link (file 555-2818). Certain employees then asked the Board to review that decision, although they later withdrew their review application. The employer however took the occasion to put forward the argument that its labour relations are not regulated by the federal statute and this Board, but rather by the British Columbia legislation and its Industrial Relations Council.

Meanwhile, the Canadian Brotherhood of Railway, Transport and General Workers, Local 400 (hereinafter referred to as CBRT & GW), applied to both the British Columbia Industrial Relations Council and this Board for certification as the bargaining agent for a unit of unlicensed employees of Sea-Link. The British Columbia Industrial Relations Council decided to defer action on this application until the Board had reviewed the CMSG certification in the light of Sea-Link's constitutional representations. This Board also withheld a determination of the CBRT & GW application.

Sea-Link's representations caused us to be concerned about the correctiveness of the original assumption that the employer is under federal jurisdiction. A hearing into the question was held in Vancouver on September 26, 1989.

II

Peter Brown, president of Sea-Link, testified that the company was set up in 1988 for the purpose of entering into a five-year contract with CP Rail to transport truck trailers and some trucks consigned to CP Rail, between

Vancouver harbour and Swartz Bay on Vancouver Island. Under the contract and for the transportation of CP Rail freight, Mr. Brown arranged to provide a tug, the Arctic Taglu, and a large barge, the Link 100, which is capable of accommodating up to 41 trailer units. The contract indicates, and Mr. Brown confirmed, that what led particularly to CP Rail using Sea-Link's services was the fact that Sea-Link could offer what is described in the contract as an "integrated pusher tug/barge system". We understand that this is a unique system.

As its name implies, Sea-Link provides a link in CP Rail's transportation system between its facilities on the mainland of Canada and its facilities on Vancouver Island. Transport trailers and trucks consigned to CP Rail for transportation are assembled under CP Rail control, in a compound owned by CP Rail at or adjacent to a CP Rail dock in Coal Harbour, Vancouver. CP Rail arranges then for these trailers to be pushed or backed on to the barge, Link 100. No rail cars are involved.

Five days a week, Monday to Friday, the Arctic Taglu, pushing Link 100, leaves Vancouver at 11:00 p.m. and arrives at Swartz Bay at roughly 3:30 a.m. at the CP Rail dock. On the Vancouver Island side, persons employed by or contracted to CP Rail remove the trailers to a nearby CP Rail compound. From that point, they go on to those for whom CP Rail has undertaken to transport them.

Once the barge is unloaded at Swartz Bay, it takes on a new load of vehicles that are being transported by CP Rail and that have been assembled in the Swartz Bay compound. The pusher tug and barge leave at about 5:00 a.m. and arrive back in Coal Harbour at approximately 9:45 a.m. The

movements of the Sea-Link vessels are all within what Mr. Brown described as British Columbia territorial waters.

CP Rail, as we have said, provides the docks, the compounds, the loading and the unloading, and is responsible to its individual customers for ensuring that the trailers and trucks are carried safely and expeditiously between Vancouver and Swartz Bay. These customers have no connection with Sea-Link. Sea-Link simply provides and operates the tug and barge for CP Rail. Its sole customer, in this respect, is CP Rail.

Sea-Link personnel will be aware of what a trailer may be carrying only if the cargo includes dangerous goods. These are identified and documented and the documentation is made available to the master of the tug.

Under the contract, all trucks and trailers "for the purpose of responsibility, shall be deemed to be in BCCSS's possession" at all times. (BCCSS is "Canadian Pacific Limited, British Columbia Coastal Steamship Services", the entity described in the contract as being the party with which Sea-Link is in a contractual relationship. The contract itself is signed on behalf of Canadian Pacific Limited by the president of CP Rail).

The contract also makes clear that Canadian Pacific is responsible for insuring all trucks and trailers and their cargoes against risks while on board a Sea-Link vessel or being loaded or unloaded.

CP Rail establishes and advertises the schedules for trips between Coal Harbour, Vancouver and Swartz Bay (Sea-Link publishes no schedules), decides which trucks and/or trailers will be loaded aboard the vessel for any particular

trip and bills and collects directly from its customers for the services provided.

The Board was given a copy of a letter dated August 15, 1989 from the Manager, Operations and Sales, Coastal Marine Operations, on the letterhead of CP Rail Coastal Marine Operations, setting out the schedule of sailings offered by "CP Rail, Coastal Marine Operations, Commercial Freight Service" between Vancouver and Swartz Bay aboard the Arctic Taglu/Link 100 and also between Vancouver and Swartz Bay and Vancouver and Nanaimo aboard other named vessels. The schedule indicates that the sailings are offered to customers as CP Rail services; it does not identify Sea-Link or any of the other companies which actually operate vessels for CP Rail in service between Vancouver and points on Vancouver Island. Sea-Link president, Mr. Peter Brown, told the Board that certain of the other listed vessels are operated under contract to CP Rail by other companies; CP Rail itself owns and operates the "Carrier Princess", which carries rail cars as well as trucks and trailers.

In essence, Sea-Link's responsibility is to provide and operate the Arctic Taglu/Link 100 vessels in accordance with terms and conditions agreed to between it and Canadian Pacific and to be reimbursed for so doing by CP Rail.

President Brown, in his testimony, described Sea-Link's work for CP Rail under the contract as its "sole business" and then qualified this by adding that occasionally Sea-Link will have the time between sailings and the opportunity to do some "spot business" on its own behalf, servicing other vessels in Vancouver Harbour. This can involve such activity as delivering lubricating oil to them. But about 98% of its revenue comes from the CP Rail work. Mr. Brown told the Board that Sea-Link exists only because of CP Rail;

his company is simply "an addition to a system they already had going".

III

In Northern Telecom Ltd. v. Communications Workers of America et al., [1980] 98 D.L.R. (3d) (Northern Telecom 1), at pages 12, 13, 14 and 15, Dickson J. (as he then was), writing for the Supreme Court of Canada, described the process that should be followed in determining constitutional jurisdiction in labour matters. At page 14, the Supreme Court said:

"... the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation ... to look at the 'normal or habitual activities' of that department as 'a going concern' and the practical and functional relationships of those activities to the core federal undertaking".

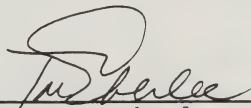
If the particular subsidiary operation may be characterized as "vital", "essential" or "integral" to the operation of the core federal undertaking, if it is functionally integrated into the operation of the core federal undertaking, it falls under the authority of Parliament and under the Canada Labour Code. This analytical approach has continued to be applied by the courts up to the present time to answer similar constitutional questions.

It is common knowledge that CP Rail, as a transportation undertaking, is a federal work, undertaking or business and that its relations with its employees are regulated by and under the Canada Labour Code. As a railway and transportation undertaking connecting British Columbia with the provinces of Canada and extending beyond the limits of British Columbia, it is clearly a core federal undertaking. Within British Columbia, Canadian Pacific's transportation system does not end at Coal Harbour. It carries on to and

includes operations on Vancouver Island. Between Coal Harbour and Vancouver Island, the operation of its system requires that its cargoes, whether rail cars or trucks and trailers (some of which have been removed from "piggy-back" rail flatcars), be placed on vessels or barges so as to be able to continue to their destinations. Without such vessels or barges, without the functions afforded by Sea-Link (and other contractors, as well as on its own account via the "Carrier Princess"), CP Rail would obviously have some difficulty in doing business in that part of Canada lying over the water from Coal Harbour.

The evidence is clear that what Sea-Link does for CP Rail on a normal or habitual basis as a going concern is vital, essential and integral to the operations of the core federal undertaking. It is functionally integrated into the federal undertaking. Thus, Sea-Link itself must be seen as a federal work, undertaking or business.


We find, therefore, that the Canada Labour Relations Board does have the constitutional jurisdiction to apply the provisions of the Canada Labour Code in respect of Sea-Link's relations with its employees.



Thomas M. Eberlee
Vice-Chairman



James D. Abson
Member of the Board



Linda M. Parsons
Member of the Board

ISSUED at Ottawa, this 4th day of April 1990.

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Summary

NATIONAL AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS UNION
OF CANADA (CAW-CANADA), APPLICANT,
AND SHUR-GAIN DIVISION, CANADA
PACKERS INC., EMPLOYER.

Board File: 555-3049

Decision No.: 789

Résumé de Décision

SYNDICAT NATIONAL DES TRAVAILLEURS
ET TRAVAILLEUSES DE L'AUTOMOBILE, DE
L'AEROSPATIALE ET DE L'OUTILLAGE
AGRICOLE DU CANADA (TCA-CANADA),
REQUERANT, ET DIVISION SHUR-GAIN,
CANADA PACKERS INC., EMPLOYEUR.

Dossier du Conseil: 555-3049

N° de Décision: 789

These reasons deal with the
constitutional jurisdiction of the
Board over employees working at a
feed mill at Truro, Nova Scotia.

Les présents motifs traitent de la
question de savoir si la compétence
constitutionnelle du Conseil s'étend
aux employés d'une usine d'aliments
pour animaux située à Truro, en
Nouvelle-Ecosse.

In the reasons the Board discusses
the geographic scope of the
declaration under section 76 of the
Canadian Wheat Board Act, R.S.C.,
1985, c. C-24 and adopts the
unanimous views of the Federal Court
of Appeal in Cargill Grain Co. Ltd.
and Canada Labour Relations Board et
al. (1989), 63 D.L.R. (4th) 174
(F.C.A.) which found that said
declaration is Canada-wide.

Dans les motifs, le Conseil discute
de la portée géographique de la
déclaration en vertu de l'article
76 de la Loi sur la Commission
canadienne du blé, L.R.C. (1985),
c. C-24, et adopte le point de vue
unanime de la Cour d'appel fédérale
dans Cargill Grain Co. Ltd. and
Canada Labour Relations Board et al.
(1989), 63 D.L.R. (4th) 174
(C.A.F.), selon lequel ladite
déclaration s'applique à l'échelle
du Canada.

The Board also deals with the
declaratory powers of Parliament
under section 92(10)(c) of the
Constitution Act, 1867 and the
purported limitation thereunder vis-
à-vis works as opposed to
undertakings. In this regard, the
Board adopted the majority decision
of the Federal Court of Appeal in
Central Western Railway Corporation
v. United Transportation Union et
al., [1989] 2 F.C. 186; (1988), 47
D.L.R. (4th) 161; and 84 N.R. 321
and found that it does have
jurisdiction to regulate the labour
relations of Shur-Gain at its feed
mill at Truro, Nova Scotia.

Le Conseil traite également des
pouvoirs déclaratoires du Parlement
en vertu de l'alinéa 92(10)c) de la
Loi constitutionnelle de 1867 et des
restrictions sous-entendues en ce
qui concerne les ouvrages par
rapport aux entreprises. A cet
égard, le Conseil adopte la décision
majoritaire de la Cour d'appel
fédérale dans Central Western
Railway Corporation c. Travailleurs
unis des transports et autres,
[1989] 2 C.F. 186; (1988), 47 D.L.R.
(4th) 161; et 84 N.R. 321, et juge
que la réglementation des relations
de travail à l'usine d'aliments pour
animaux de Shur-Gain à Truro
(Nouvelle-Ecosse) relève de sa
compétence.



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Reasons for decision

National Automobile, Aerospace
and Agricultural Implement Workers
Union of Canada (CAW-Canada),

applicant,

and

Shur-Gain Division, Canada
Packers Inc.,

employer,

Board File No.: 555-3049

The Board was composed of Vice-Chairman Hugh R.
Jamieson and Members Calvin B. Davis and Michael Eayrs.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

Messrs. Dale Patterson and Leo McCormick, Local
representatives of the applicant union; and
Messrs. T.W. Gruchy, Q.C., and Brian M. Johnston,
counsel for the employer.

I

These reasons deal with an application for certifi-
cation which was filed with the Board on December 18,
1989 by the National Automobile, Aerospace and
Agricultural Implement Workers Union of Canada (CAW-
Canada) (the CAW or the union), seeking bargaining
rights for a group of employees of Shur-Gain, a
division of Canada Packers Inc. (Shur-Gain or the
employer), working at a feed mill at Truro, N.S. In
its response to the application the employer raised the
issue of this Board's constitutional jurisdiction to
regulate its labour relations. On March 13, 1990 the
Board held a public hearing at Halifax, Nova Scotia.

Prior to the hearing, which was restricted solely to the constitutional question, the Board, by way of the following notice, directed the attention of the parties to what it considered to be the most recent relevant developments in the rather complicated area of constitutional law affecting Parliament's declaratory powers under section 92(10)(c) of the Constitution Act, 1867 which directly affect these proceedings:

"Further to our hearing notice dated February 2, 1990, the Board would like to remind the parties that the March 13, 1990 hearing is restricted to the sole question of the Board's constitutional jurisdiction over the certification application. In this regard, the Federal Court of Appeal decisions in Re Central Western Railway v. United Transportation Union (1988), 47 D.L.R. (4th) 161 and Cargill v. CLRB, FCA File No: A-167-89, dated October 17, 1989, are of particular interest to the Board."

At the hearing the union had little or nothing to offer other than to produce previously issued certification orders of this Board affecting other feed mills in Atlantic Canada. The employer, on the other hand, argued strenuously that its operations at Truro properly fall within provincial jurisdiction.

II

Canada Packers Inc. is a company having its head office at Toronto. It is involved in diversified operations in all Provinces of Canada including but not limited to food processing, packing houses, poultry processing plants, dairy manufacturing products, feed mills and potato operations.

Shur-Gain is one of several divisions of Canada Packers Inc. Shur-Gain operates 19 feed mills in Canada, 5 of which are in Atlantic Canada including the feed mill at Truro, N.S., the subject of this application. Each feed mill is an independent business entity concentrating primarily on manufacturing and distributing animal feed to customers in the Province where the feed mill is located. For example, the feeds produced at Truro are sold to livestock producers, the majority of whom (about 80%) are located in Nova Scotia. The remainder, approximately 20%, is transported to Newfoundland for sale there.

The Truro feed mill produces three types of feed: animal feed for livestock and poultry; "ultra-mix", which is a special package of ingredients that is supplied to other feed mills of Shur-Gain in Atlantic Canada for use in their production processes; and fish feed. Fish feed is a relatively new venture for Shur-Gain in which the Truro feed mill is the pilot project. According to the employer, this fish feed product has the potential to evolve as the major product at Truro; however, at the present time livestock and poultry feed is the primary commodity being produced at the Truro feed mill.

Shur-Gain's Truro feed mill receives about 25,000 metric tonnes of grain annually which is purchased through brokers. About seventy-five percent (75%) is barley, wheat and oats from Canada's prairie provinces, while about twenty-five percent (25%) is corn from Ontario. A small amount of barley and oats is purchased from local producers. The protein which is used to mix with the grains is derived from soybean received from Ontario, and canola (rapeseed) which is shipped from Ontario or the West. Almost all the grain

from Ontario and the Western provinces is brought directly into the Truro feed mill by rail car. Occasionally, a shipment is received by truck through a grain elevator in Halifax, Nova Scotia, which in turn receives its grain via ship from Thunder Bay. Also, each year there are a few shipments of locally grown grains hauled in by truck.

When the raw grain arrives at Truro, it is unloaded from the rail cars through a bucket-lift conveyor into four (4) storage tanks, each holding eight thousand (8,000) bushels. From the storage tanks the grain is directed through pipes (gravity feed) to grinding, crushing, rolling machines or mixing containers, depending on the product being manufactured. The processed grain is then combined with other additives to form the final product which is mainly in the form of a mash or pellets. According to witnesses for the employer, the proportion of grain to other additives in the various products is as follows:

| | |
|----------------------------------|-----|
| Livestock and Poultry Feed | 60% |
| Ultra-Mix | 5% |
| Fish Feed | Nil |

The employees affected by this application for certification work as plant workers at the feed mill and are directly involved in the feed mill operations. They are classified as service centre clerk, grinder, mixer, fish feed mixer, maintenance, pellet operator, general labourer, and lead hands.

Shur-Gain also operates a small retail outlet at the Truro feed mill which offers pet foods, vitamins, veterinary products and bags of feed for sale to local customers.

III

For our purposes here we shall make the decision of the Federal Court of Appeal in Cargill Grain Co. Ltd. and Canada Labour Relations Board et al. (1989), 63 D.L.R. (4th) 174 (F.C.A.) (the Cargill decision) the focal point of our discussions on the applicable law. In this majority decision the Federal Court of Appeal overturned a decision of this Board wherein the Board had found that it had constitutional jurisdiction over some clerical workers of Cargill Grain Company at Chatham, Ontario. In taking jurisdiction, the Board had found that the work performed by the clerical group at Chatham was intimately related to and therefore a vital and integral part of the portion of Cargill's operations which had been declared to be works for the general advantage of Canada, namely grain elevators and feed mills. The majority of the Court, Mr. Justice Hugessen and Madame Justice Desjardins, said that the Board had erred in finding Cargill's operations to be a federal undertaking. In dissent, Mr. Justice MacGuigan agreed with the Board's decision.

In the Cargill decision the Court dealt with the scope of Parliament's declaration affecting the grain industry under section 76 of the Canadian Wheat Board Act, R.S.C., 1985, c. #C-24. The Court also discussed the limitations on Parliament's declaratory powers under section 92(10)(c) of the Constitution Act, 1867 vis-à-vis works as opposed to undertakings. Both of these topics are germane to the constitutional question before us in this case; however, before we deal with them we feel that it is appropriate to set out briefly the differing views about the extent of the declaration under section 76 of the Canadian Wheat Board Act prior to the Cargill decision.

Let us start by reiterating the obvious, i.e., the general rule is that labour relations is a matter of provincial competence - Toronto Electric Commission v. Snider et al. (1925), 2 D.L.R. 5 (S.C.C.) and Northern Telecom Ltd. v. Communications Workers of Canada (1979), 98 D.L.R. (3d) 1.

One exception to the primary provincial competence rule is where works have been declared to be for the general advantage of Canada or for the advantage of two or more of the Provinces pursuant to section 92(10)(c) of the Constitution Act, 1867:

"92. In each Province the Legislator may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, -

(10) Local Works and Undertakings other than such as are of the following classes: --

(a) Line of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.

(c) such Works as, although wholly situated within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

(emphasis added)

(We have reproduced 92(10)(a) for comparison to highlight the distinction between works to which 92(10)(c) is limited and undertakings which we will be discussing later in these reasons).

There are two declarations by Parliament under section 92(10)(c) affecting the grain industry in Canada. One under the Canada Grain Act, R.S.C., 1985, c. #C-10, (the Grain Act) and the other under section 76 of the Canadian Wheat Board Act which we have already referred to.

Section 55 of the Grain Act provides:

"55.(1) All elevators in Canada heretofore or hereafter constructed, except elevators referred to in subsection (2) or (3), are and each of them is hereby declared to be a work or works for the general advantage of Canada.

(2) All elevators in the Eastern Division heretofore or hereafter constructed, as defined in paragraph (d) of the definition 'elevator' in section 2, are and each of them is hereby declared to be a work or works for the general advantage of Canada.

(3) All elevators in the Eastern Division heretofore or hereafter constructed, as defined in paragraph (e) of the definition 'elevator' in section 2, are and each of them is hereby declared to be a work or works for the general advantage of Canada."

The "Eastern" and "Western" Divisions are defined in the Grain Act as:

"'Eastern Division' means that part of Canada not included in the Western Division.

'Western Division' means all that part of Canada lying west of the meridian passing through the eastern boundary of the City of Thunder Bay, including the whole of the Province of Manitoba."

"Elevators" are defined in the Grain Act as:

"'elevator' means

(a) any premises in the Western Division

(i) into which grain may be received or out of which grain may be discharged directly from or to railway cars or ships.

(ii) constructed for the purpose of handling and storing grain received directly from producers, otherwise than as a part of the farming operation of a particular producer, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged, or

(iii) constructed for the purpose of handling and storing grain as part of the operation of a flour mill, feed mill, seed cleaning plant, malt house, distillery, grain oil extraction plant or other grain processing plant, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged for processing or otherwise,

(b) any premises in the Eastern Division, situated along Lake Superior, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario or the canals or other navigable waters connecting those Lakes or the St. Lawrence River or any tidal waters, and into which grain may be received directly from railway cars or ships and out of which grain may be discharged directly to ships,

(c) the portion of any premises in the Eastern Division designated by regulation pursuant to subsection 98(3) that is used for the purpose of storing grain,

(d) any premises in the Eastern Division constructed for the purpose of handling and storing grain received directly from producers, otherwise than as a part of the farming operation of a particular producer, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged, and

(e) any premises in the Eastern Division constructed for the purpose of handling and storing grain as a part of the operation of a flour mill, feed mill, seed cleaning plant, malt house, distillery, grain oil extraction plant or other grain processing plant, and into which grain may be weighed, elevated and stored and out of which grain may be discharged for processing or otherwise, including any such premises owned or operated by Her Majesty in right of Canada or a province or any agent thereof.

Section 121 of the Grain Act stipulates that sections 55(2) and 55(3) and paragraphs (d) and (e) of the definition of "elevator" affecting elevators in the Eastern Division will not come into force until a day to be fixed by proclamation. No such proclamation has been made to date.

The effect of this limitation on the declaration under section 55 of the Grain Act is that all elevators in the Western Division are caught by the declaration and are therefore works declared to be for the advantage of Canada.

In the Eastern Division, only those elevators defined in paragraphs (b) and (c) of the definition of "elevator" are affected by the declaration. Paragraph (b) speaks for itself. Under paragraph (c) a Regulation to the Grain Act, (The List of Elevators in the Eastern Division Regulations, SOR/89-319) names the specific elevators in Eastern Canada which fall within the scope of the declaration. Shur-Gain's grain storage facilities which are operated as part of its feed mill at Truro, N.S. are not named in these Regulations.

Clearly, the declaration under section 55(1) of the Grain Act does not affect the Shur-Gain feed mill at Truro, Nova Scotia. If it is to be caught by a declaration it would be by section 76 of the Canadian Wheat Board Act (the CWB Act):

"76. For greater certainty, but not so as to restrict the generality of any declaration in the Canada Grain Act that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada and, without limiting the generality of the foregoing, every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada."

(emphasis added)

Unlike the Grain Act, the CWB Act does not divide Canada into two divisions but certain aspects of the CWB Act are limited to a "designated area" which is defined in section 2 as:

"'designated area' means that area comprised by the Provinces of Manitoba, Saskatchewan and Alberta, and those parts of the Province of British Columbia known as the Peace River District and the Creston-Wynndel Areas, and such other areas as the Board may designate under subsection (3)."

The reference to the "designated area" in parts of the CWB Act has resulted in divergent views and conflicting interpretations arising as to the scope of the section 76 declaration. There are many examples of these differing views but they can best be illustrated in two cases arising in the Province of Quebec, namely, R. v. Lorenzo Camirand, [1976] C.S. 1294; and Compagnie du Trust National Ltée v. Burns et al, [1985] C.S. 1286. In R. v. Camirand, supra, the Quebec Superior Court ruled that the declaration under section 76 of the CWB Act was limited in scope to the "designated area". Finding to the contrary in Compagnie du Trust National Ltée v. Burns et al, supra, Madame Justice Mailhot, J., of the Quebec Supreme Court, ruled that section 76 of the CWB Act (then section 45), has no territorial restrictions and that it applies to all of Canada. (We understand that the appeal from this decision will be heard by the Quebec Court of Appeal on April 19, 1990).

The confusion in labour relations communities across the country caused by the divergent views over the scope of section 76 of the CWB Act declarations is apparent when one views the hodge-podge of federal and provincial certification orders that exist affecting feed mills. Amongst the 15 feed mills operated by Shur-Gain, one at Edmonton, Alberta and two in the Province of Quebec are provincially certified. As we pointed out earlier, the CAW referred us to several certification orders issued by the Board affecting feed mills in Atlantic Canada. In fact, if one looks at three other feed mills at Truro, Nova Scotia, one has been certified provincially while the other two have bargaining agents which were certified by this Board.

It seems, however, that at last some progress has been made towards resolving the dispute over the territorial scope of section 76 of the CWB Act. For this Board at least, the question has been answered by the Federal Court of Appeal in the Cargill decision. In his reasons for decision, Mr. Justice Hugessen said the following about section 76 of the CWB Act:

"While I cannot agree with counsel's submission that this declaration should not be given its full force and effect so as to catch feed warehouses, seed cleaning mills and feed mills in Eastern Canada, I am also of the view that it should not be extended beyond its terms."

(page 182)
(emphasis added)

Madame Justice Desjardins, in her concurring reasons, also noted that 15 feed mills operated by Cargill in Ontario had been declared thus showing that the declaration in section 76 of the CWB Act is not limited to the west of Canada or to the "designated area".

Mr. Justice MacGuigan, although dissenting on the majority's final conclusion, did agree with the majority regarding the scope of section 76 CWB Act declarations. He said the following in his reasons:

"Nevertheless, I find it impossible to come to any other conclusion than that no reason has been adduced to restrict the generality of the words in section 76. Indeed, the reasons to the contrary as seen by Mailhot J. lead me also to her conclusion, that the declaration in section 76 of the Canadian Wheat Board Act should be taken to apply to 'all flour mills, feed mills, feed warehouses and seed cleaning mills' in Canada."

(page 192)
(emphasis added)

Clearly, this Board is bound by these unanimous views of the Federal Court of Appeal and this panel of the Board certainly accepts and adopts those views as our own for the purposes of the constitutional question before us in the instant application for certification. Accordingly, it is our finding that section 76 of the CWB Act does apply to the Shur-Gain feed mill at Truro, N.S. and that the said feed mill is therefore a work that has been declared by Parliament to be for the general advantage of Canada.

We make this finding notwithstanding the argument of the employer that the operation at Truro, N.S. is not a "feed mill" within the terms of the CWB Act. Basically, the employer argued that the diversification from livestock and poultry feeds to fish feed in which grain is not an ingredient remove its operations from the traditional concept of a feed mill.

In this regard we note that the CWB Act does not define "feed mills". Nor does it define flour mills, feed warehouses or seed cleaning mills which are all mentioned in section 76. The Ontario Labour Relations Board was faced with a similar problem when it had to decide if a certain building was a feed warehouse in Maple Leaf Mills Limited (1974), OLRB Rep. Oct. 797. The building in question was also used to retail sundry items. Employees involved in the operation spent about 80% of their time in the feed warehouse operation and 20% retailing sundry items. The OLRB said the following at page 798:

"The respondent is certainly engaged in the manufacture and distribution of feed and this warehouse in London is an essential part of its operations. Although there is no definition of the word warehouse in the legislation, it can be taken that it refers to a building in which feed is stored (whether for the purposes of retail or wholesale - see The Concise Oxford Dictionary (1964), p. 1468), and the building in question is

primarily devoted to such a function. (There would appear to be no requirement that the building be used exclusively as a feed warehouse; see Letter Carriers' of Canada v. Canadian Union of Postal Workers et al (1973), 40 D.L.R. (3d) 105 (S.C.C.) p. 112 - only its principal purpose need be in relation to the storing of feed.)"

(emphasis added)

We take a similar approach in this case. There can be little question that the primary operation of Shur-Gain's Truro feed mill is milling grain for mixing into livestock and poultry feeds. It seems to us that this is the type of operation that the legislation had in mind when the declaration was enacted. We are satisfied that on the facts before us at the present time, Shur-Gain's operation at Truro, N.S. is a feed mill within the terms of the CWB Act.

IV

The matter does not end there, however. According to the majority of the Federal Court of Appeal in the Cargill decision even if a work has been declared to be for the advantage of Canada pursuant to section 92(10)(c) of the Constitution Act, 1867, it does not necessarily follow that the labour relations of the undertaking is ousted from provincial competence and brought under Part I of the Code.

To put this distinction into perspective we have to go back to another decision of the Federal Court of Appeal in Central Western Railway Corporation v. United Transportation Union et al., [1989] 2 F.C. 186; (1988), 47 D.L.R. (4th) 161; and 84 N.R. 321 (Central Western decision). This case involved a railway company that was incorporated by a special Act of the Province of Alberta which purchased and operated an intra-provincial railway on a stretch of track

situated wholly within the Province of Alberta. This trackage, known as the Stettler Subdivision, had been the subject of a declaration under section 92(10)(c) of the Constitution Act as a part of Canadian National Railway Company from whom Central Western purchased this 100 mile stretch of track. The majority of the Court, Justices Marceau, J. and Lacombe, J., found that the declaration did not disappear with the change of ownership; the railway line remained within federal jurisdiction. Further, Mr. Justice Marceau found that the labour relations of Central Western were also within federal jurisdiction as federal jurisdiction extends to undertakings whose sole reason for being is to operate on a continuous basis, the federal work. Mr. Justice Lacombe went even further; he said that Central Western's labour relations is an essential element of Parliament's exclusive authority to make laws with respect to a work that has been declared to be for the general advantage of Canada.

In dissent, Mr. Justice Hugessen found that although Central Western railway line fell within federal jurisdiction because of the continuing effect of the section 92(10)(c) declaration, notwithstanding the transfer of ownership, this federal authority did not extend to the regulation of labour relations of Central Western which is purely a local undertaking.

In his minority decision, Justice Hugessen said the following:

"Subsection 92(10) speaks of both 'works' and 'undertakings'. In my view, it is essential to a proper understanding of the text to bear this fact in mind and to know that 'works' and 'undertakings' are two quite separate things.

(pages 208; 177; and 332)

If I have found it necessary to insist on the distinction between 'works' and 'undertakings', it is because the word 'railway' is often used interchangeably to designate either. As a work, a railway is a line of track and the attendant right-of-way and installations; as an undertaking, it is a business with assets (including, but not by any means limited to, the railway work) and employees.

(pages 210; 178-179; and 334)

There is, as far as I am aware, no case which holds that labour relations are subject to federal jurisdiction simply because the labour is performed on or in connection with a federal work. That is hardly surprising. Works, being physical things, do not have labour relations. Undertakings do.

(pages 214; 182; and 336)

It may well be that, as suggested by some commentators, the effect of a declaration under para. 92(10)(c) is '...to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein'...

The cases cited to support this proposition, however, do not extend federal jurisdiction beyond what is necessary to the regulation of the work itself... There is, however, no authority for holding that federal jurisdiction extends generally to all the operations of persons using or owning the work and particularly to their labour relations.

(pages 216; 183; and 336-337)

The undertaking and business of Central Western are provincial and local in character. Its trackage and right-of-way are subject to federal jurisdiction by virtue of a declaration under para. 92(10)(c). Federal authority extends to the use which may be made of the track but regulation of the labour relations of the user is not an integral element of that authority. Effective control of the work does not require control of the undertaking. Accordingly, the Canada Labour Relations Board had no jurisdiction to make the decision under review."

(pages 217; 184; and 337)

Mr. Justice Lacombe rejected any such work/undertaking dichotomy:

"In the present state of the law, there cannot be such a work-undertaking dichotomy, whereby in the

case of a railway company conducting its local operations on a federal line, the labour relations of the undertaking would be subject to provincial jurisdiction, whereas all other aspects of the utilization of the line, qua federal work such as signals and safety would be regulated by federal authority. The regulation of the conditions of employment of Central Western's employees forms an integral part of the primary federal competence over the matter coming within the class of subjects mentioned in para. 92(10)(c) of the Constitution Act, 1867 and is directly related to the day-to-day utilization of a federal work. ...

Unless and until the declaration by Parliament ceases to have effect with respect to the Stettler Subdivision, both the work and the undertaking of Central Western are subject to federal jurisdiction. ... By way of exception to the general rule that labour relations are within provincial competence, federal competence over Central Western's labour relations is an essential element of Parliament's exclusive authority to make laws with respect to a work it has declared to be for the general advantage of Canada."

(pages 227-228; 192-193; and 343)

Mr. Justice Marceau contrasted the ongoing and continuous nature of Central Western's operations on the declared railway line to the temporary situation depicted in Montcalm Construction Inc. v. Minimum Wage Commission et al. (1978), 93 D.L.R. (3d) 641:

"It is my opinion, however, that a basic difference must be seen here between, on the one hand, an undertaking which is only called upon to participate in the construction, repair or maintenance of a federal work, or which happens to use such a work to conduct its operations and, on the other hand, the undertaking whose sole reason for being is to operate on a continuing basis the federal work, to exploit its productive capacity, to make it produce, so to speak, the 'national general benefit' expected from it. The national dimension present in the case of the latter, makes it normal, it seems to me, that the federal character of the work would attract federal jurisdiction over all essential aspects of the operation thereof. This, in any event, is the position taken by Parliament in enacting section 108 [now section 4] of the Canada Labour Code which reads:

'108. This part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with

such employees and in respect of trade unions and employers' organizations composed of such employees or employers.'"

(pages 204; 174; and 330-331)

Against that background of the Central Western decision, we now move forward to the Cargill decision, which we re-emphasize related to a group of office employees who did not work directly on the work that had been declared under section 92(10)(c). In this decision, as part of the majority, Mr. Justice Hugessen reiterated his views on the work/undertaking distinction:

"I have on a previous occasion dealt with the distinction which must be made between works and undertakings in terms of the federal declaratory power in subsection 92(10) of the Constitution Act and I need not repeat myself here. In that case, the Court divided over the question of whether an undertaking, otherwise provincial in nature, whose sole raison d'être was the operation of a federal work, became by that fact a federal undertaking. The facts of the present case are a long way from those in Central Western and argue even more strongly for exclusive provincial jurisdiction over labour relations.

The undertaking of Cargill Grain Company, Limited is far from being exclusively that of the operation of a federal work. It is and is described in the materials before the Board as a grain merchandiser.

...

This, as it seems to me, is conclusive against federal jurisdiction over labour relations in that office. The undertaking of Cargill is not that of an operator of grain elevators, all or even most of which have been declared to be federal works, who incidentally engages in the activity of buying, selling and transportation of grain. On the contrary, the undertaking of Cargill, as it is uniformly and consistently described throughout the material, is that of a grain merchandiser buying, selling and trading in grain in Ontario, who, as an incidental to that undertaking, operates elevators for the receipt, storage and delivery of the products dealt in. In my view such an undertaking is wholly provincial in its essence even if some part of the activities relates to interprovincial or international trade and some part of the physical plant includes works which have been declared for the general advantage of Canada."

(pages 183-184)

Madame Justice Desjardins, while concurring with Mr. Justice Hugessen as to the provincial nature of Cargill's operations, declined to comment on the effect of the Central Western decision:

"Even assuming that it could be said, as a result of the decision of this Court in Central Western Railway Corporation v. United Transportation Union (1988), 47 D.L.R. (4th) 161; [1989] 2 F.C. 186; 84 N.R. 321 (F.C.A.), that the workers and management responsible for the operation of the works declared come under federal labour legislation, - a matter I need not decide here -, this would not change the key character of the undertaking of the applicant which is local in nature."

(page 185)
(emphasis added)

For his part, Mr. Justice MacGuigan expressed his concurrence with the majority in the Central Western decision and in particular with the views expressed by Mr. Justice Lacombe:

"It seems to me that the fundamental difference between the majority and minority points of view reduces itself to different views as to the extent of the provincial 'paramountcy' in labour relations. That 'paramountcy' itself is not in dispute, but I take it that the majority judges in Central Western see the effect of the federal declaratory power as conferring priority in favour of federal jurisdiction within a reasonable ambit of interpretation of the declaratory power. I see nothing to contradict this in recent decisions such as Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754, (1978), 93 D.L.R. (3d) 641, 25 N.R. 1, and Northern Telecom v. Communications Workers of Canada, [1980] 1 S.C.R. 115, (1979), 98 D.L.R. (3d) 1, 28 N.R. 107 (Northern Telecom No. 1). Moreover, as Lacombe J.A. pointed out, exclusive federal legislative authority seems to be a clear consequence of subsection 91(29) of the Constitution Act, 1867. Indeed, Lord Porter made this explicit in A.G. Ont. v. Winner, [1954] A.C. 521 at 568, [1954] 4 D.L.R. 657 (P.C.) at 666, where he stated that Parliament's jurisdiction over subsection 92(10) is the same as it 'would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under s. 91'. In the words of Dickson J. (as he then was) in Northern Telecom No. 1 (at 132 S.C.R., 13 D.L.R.):

'Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations under the conditions of employment but only if it is demonstrated that the federal authority over these matters is an integral element of such federal competence.'

Section 4 of the Code builds upon this basis.

As I read the Central Western case, therefore, it stands for the proposition that an undertaking based upon a federal work and the labour relations of that undertaking follow upon and for jurisdictional purposes are integral with the federal work itself."

(page 195)

From an analysis of the foregoing views expressed by the various Federal Court Judges who have had an opportunity to speak on the matter, it is apparent that the debate over the principles to be applied when determining constitutional authority over labour relations where works are declared to be federal under section 92(10)(c) of the Constitution Act, 1867 is far from settled. Until it is, it seems to us the wise course for the Board to take is to adopt the interpretation which gives realistic substance to section 4 of the Code:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

(emphasis added)

(For what it is worth, we note that section 2(h) of the Code also refers to "undertakings" as well as to "works").

To do otherwise would be to question the authority which Parliament has traditionally exercised over the grain industry, even in Western Canada where the Grain Act and the CWB Act declarations capture practically the whole industry. This authority has not only included the regulation of the movement and processing of grain, it has also extended to the regulation of industrial relations in the industry. Examples of this jurisdiction which has been accepted by the labour relations community in the grain industry are found in the "back-to-work" legislation which has been enacted by Parliament in recent years.

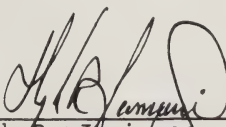
It would require some very clear and unequivocal directions from the Court for this Board to say that some undertakings in the grain industry, or for that matter in other industries where works have declared to be federal and which have traditionally been regulated for labour relations purposes under Part I of the Code, now fall within provincial jurisdiction. In the absence of such a clear direction, and, with the utmost respect to those who may have expressed views to the contrary, we prefer and adopt the majority decision in Central Western which is supported by the minority in the Cargill decision. Given the narrowest interpretation, this appears to stand for the proposition that undertakings, or presumably identifiable divisions thereof, which operate works that have been declared to be federal works pursuant to section 92(10)(c) of the Constitution Act, 1867 on an ongoing and continuous basis, fall within the meaning of "federal works, undertakings or businesses" for the purposes of section 4 of the Code. (There appears to be room for an even broader interpretation according to the views expressed by Justices Lacombe and MacGuigan).

V

Unlike the situation in the Cargill decision where the affected employees were not directly employed upon the declared work, what we have before us in this case involves employees who actually operate the works which have been declared to be federal under section 76 of the CWB Act.

The undertaking, Shur-Gain, a division of Canada Packers is solely in the business of operating feed mills in various parts of the country. Shur-Gain operates the feed mill at Truro, N.S., as a separate business from its other feed mills, on an ongoing and continuous basis. Applying the Central Western test, the Board accordingly concludes that it does have jurisdiction to regulate the labour relations of Shur-Gain's feed mill at Truro, N.S. The Board will therefore proceed to determine the merits of the application for certification and the parties will be notified of the Board's decision in due course.

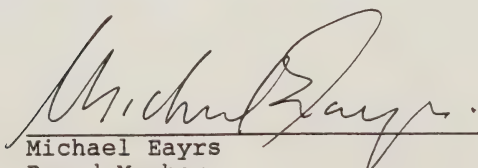
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Calvin B. Davis
Board Member



Michael Eayrs
Board Member

ISSUED at Ottawa this 9th day of April, 1990.

